JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1163

VIRGO CORPORATION, *Petitioner*

v.

RALPH M. PAIEWONSKY, Governor, MORRIS F. DE-CASTRO, ALBERT PRENDERGAST, PERCY DEJONGH, RUBEN WHEATLEY, MAHLEN LINDQUIST, ADOLPH POTTER, JOSEPH ALEXANDER, PERCY GARDINE, and the GOVERNMENT OF THE VIRGIN ISLANDS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Virgo Corporation petitions for a writ of certiorari to review two judgments of the Court of Appeals for the Third Circuit entered in this case on September 29, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 1a-29a) is reported at 384 F.2d 569. The first opinion of the District Court for the Virgin Islands (Appendix D, *infra,* pp. 35a-46a) is reported at 251 F. Supp. 279, and the second opinion of the District Court of the Virgin Islands (Appendix E, *infra,* pp. 47a-64a) is reported at 254 F. Supp. 405. A third opinion of the District Court on the tax exemption issue only (Appendix F, *infra,* pp. 65a-69a) is reported at 259 F. Supp. 26.

JURISDICTION

The judgments of the Circuit Court of Appeals entered on September 29, 1967, are reproduced in Appendix B, *infra,* pp. 30a-32a, and the order denying rehearing entered on November 7, 1967, is reproduced in Appendix C, *infra,* pp. 33a-34a. Mr. Justice Brennan, in an order entered on January 24, 1968, extended the time for filing a petition for writ of certiorari to and including February 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In 1965 the Government of the Virgin Islands enacted discriminatory tax legislation for the acknowledged purpose of limiting the number of watches shipped to the continental United States in order to discourage enactment by Congress of pending legislation to regulate such exports. For the same reason, the Governor of the Virgin Islands denied Virgo Corporation, a local watch manufacturer, a statutory tax exemption, although the same exemption was

granted to four competing watch manufacturers. The questions presented are:

1. Whether the Government of the Virgin Islands has the power to regulate the export of goods to the continental United States.

2. Whether the Court of Appeals erred in ruling that a tax prohibiting the export of watches from the Virgin Islands to the United States did not constitute an undue burden on commerce because the manufacture of watches is not a part of commerce.

3. Whether the Governor of the Virgin Islands, in making administrative decisions, may disregard applicable statutory criteria and base such decisions on a personal desire to discourage Congressional legislation of which he disapproves.

STATUTES INVOLVED

The statutes involved are printed in Appendix H, *infra,* pp. 78a-87a.

STATEMENT

This petition by Virgo Corporation ("Virgo") seeks to review an opinion by the Court of Appeals for the Third Circuit reversing two judgments entered by the District Court of the Virgin Islands invalidating (1) the Watch Production Quota Act of 1965, as originally enacted and as amended (33 V.I.C. §§ 511-518), which imposed a discriminatory taxing system to limit the quantity of watches shipped from the Virgin Islands to the United States, and (2) the action of the Governor of the Virgin Islands denying Virgo a tax exemption under the Virgin Islands Industrial Incentive Act (33 V.I.C. § 4001 *et seq.*).

1. Legislative Background

Beginning in 1959 a burgeoning watch industry developed in the Virgin Islands solely on the basis of a duty-free tariff concession granted by Congress to the territories for articles produced in the territories whose foreign-origin components do not comprise more than 50 per cent of their total value.[1] The watch operations consist primarily of assembling parts imported from Europe and Japan (CA 123b)[2]; virtually all (over 97%) of the completed watches are then shipped to and sold in the United States. (See App. 62a) Watch shipments to the United States from the Virgin Islands increased from 4,900 units in 1959 to more than 2,400,000 in 1964 and to over 3,500,000 units in 1965. (CA 117b) By 1966, there were 16 companies producing watches in the Virgin Islands. (CA 116b)

As a consequence of this rapid increase in watch shipments to the United States, watch manufacturers in this country began urging Congress to terminate or limit the duty-free entry of watches from the Virgin Islands, and legislation to this end was introduced in Congress. (CA 82b-86b) Concerned by this development, the Governor of the Virgin Islands in 1965 appointed a special committee to study the watch situation. (CA 91b) This committee recommended that the Virgin Islands set up a quota system to limit the number of watches produced by each manufacturer for shipment to the United States. (CA 91b-98b) It sug-

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[1] See 19 U.S.C. § 1202, headnote 3(a).

[2] "CA" refers to the two appendices filed with the briefs in the Court of Appeals in case No. 16,116. Pagination with a capital "A" (CA A-14) indicates Appellants' Appendix, and pagination with a small "b" (CA 14b) indicates Appellee's Appendix.

gested that the quota system be enforced by imposing a $2.50 production tax on each watch shipped to the United States in excess of the established quotas. (*Ibid.*)

In August, 1965, the Territorial Legislature of the Virgin Islands enacted the committee's recommendations almost verbatim as the Watch Production Quota Act. (33 V.I.C. §§ 511-518, reproduced at App. 50a-60a) Under this statute a quota system was established for watches manufactured in the Virgin Islands for export to the United States.[3] A $2.50 tax was imposed on each watch shipped to the United States in excess of the fixed quotas, whereas only a 3¢ tax was imposed on all other watches sold either in the Virgin Islands, in foreign countries, or in the United States within the quota system. (33 V.I.C. § 511)

2. The District Court Proceedings

Virgo, a Virgin Islands corporation affiliated with the United States Time Corporation, one of the leading watch producers in the United States, commenced watch manufacturing operations in the Virgin Islands in 1963. (CA 5b) As a result of the pressures exerted by the mainland watch industry upon the Government of the Virgin Islands, Virgo soon encountered considerable difficulty, first because the Governor failed to grant it a reasonable quota under the Watch Production Quota Act, and second, because the Governor, after long delay, denied it a tax exemption under the

[3] Section 512 established a quota of 1,800,000 watches for export to the customs area of the United States during the initial six-month period. (33 V.I.C. § 512) For subsequent twelve-month periods, the Governor was directed to fix the quota at 1/9th of "the total consumption of watches of all kinds in the customs area of the United States . . . ." (33 V.I.C. § 513(a))

Industrial Incentive Program, although Virgo had met all of the statutory requirements for the tax exemption and other similarly situated competing watch manufacturers had been granted the tax exemption.

On November 18, 1965, Virgo filed a complaint challenging the legality of the Watch Production Quota Act and the Governor's action denying it a tax exemption under the Industrial Incentive Program. (CA 1b) The District Court, after appropriate hearing, held the Act to be invalid on the ground that it imposed an export duty in violation of Section 36 of the Organic Act of 1936, as revised. (App. D)[4] (Section 36 provides that "no new export duties shall be levied in the Virgin Islands except by the Congress.") (App. 87a)

On the same day that the District Court handed down its decision, the Territorial Legislature of the Virgin Islands enacted an amended Watch Production Quota Act[5] which both courts below found contained "no changes from the original Act which were of legal significance in respect of the issues of validity in these appeals." (App. 6a-7a) The effect of the amended Act was still to impose a prohibitory $2.50

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[4] The District Court found "that the primary purpose of the Act was to limit the exportation of watches from the Virgin Islands to the 'Customs area of the United States,' to forestall the necessity of the Congress taking away the tariff concessions which the Virgin Islands watch manufacturers enjoyed. There can be no other interpretation of the Watch Production Quota Act than it being an export duty upon watches entering the 'customs area of the United States.' Such an export duty can only be levied by Congress." (App. 41a)

[5] The Amended Act fixed the annual overall quota at 1/9th of the watch consumption of the United States. (See App. 56a-60a)

tax on watches sold in the United States in excess of the quota system.

Virgo immediately brought a second suit in the District Court challenging the legality of the amended Act. (App. 47a) The District Court again held that the amended statute continued the export duty in violation of Section 36 of the Organic Act of 1936. (App. 60a-64a)

On the tax exemption issue, the District Court, in its first opinion, concluded that the case should be remanded to the Virgin Islands Industrial Incentive Board with directions that appropriate steps be taken to determine whether Virgo was entitled to the same tax exemption accorded competing watch companies. (App. 46a) However, neither the Board nor the Governor acted within the times fixed by the District Court, so the Court, on June 20, 1966, again ordered them to act. (CAE 4b)[6] On July 11, 1966, the Board found that Virgo met all the statutory requirements for the tax exemption and recommended to the Governor that Virgo be granted the exemption. (CAE 34b-35b) The Governor, however, notified Virgo that he disapproved the recommendation of the Board "for the reason that the corporation [Virgo], as evidenced by its substantial profit return, does not require the stimulus of governmental assistance as provided for by the law." (CAE 37b)

On October 10, 1966, the District Court held that Virgo's "substantial profit return" was not a statutory

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[6] "CAE" refers to the two appendices filed with the briefs in the Court of Appeals in case No. 16,374. Pagination with a capital "A" (CAE A-14) indicates Appellants' Appendix, and pagination with a small "b" (CAE 14b) indicates Appellee's Appendix.

basis for denying the tax exemption, and again remanded the case to the Governor to act in accordance with the statutory criteria. (App. 65a-69a) Once again, the Governor notified the District Court that he was denying Virgo the tax exemption solely because of "its substantial profit return." (CAE 79a) Thereupon, the District Court, on November 7, 1966, ordered the Governor to grant the tax exemption to Virgo. (CA 82a)

Thereafter, on November 10, 1966, Congress, acting under its plenary powers over the territories, enacted Public Law 89-805 which provided an annual quota for watches entering the United States duty-free from *all* the territories equal to 1/9th of the United States watch consumption for the preceding year. (CA 127b-131b) Congress allocated this quota among the Virgin Islands, Guam and American Samoa, and provided for its joint administration by the Departments of Commerce and Interior. (*Ibid.*)

3. The Court of Appeals Decision

On appeal, the Third Circuit reversed both judgments of the District Court. (App. 1a) On the question of the validity of the Watch Production Quota Act, as amended, the court below ruled "that the legislative power of the Virgin Islands Legislature is not limited by the provisions of section 36 of the Organic Act of 1936" because "the revised Organic Act of 1954 operated to repeal the Organic Act of 1936." (App. 12a) The court admitted "that the revised Organic Act did not expressly repeal the Act of 1936" (App. 11a), but it concluded that there was "repeal by implication." (App. 10a)

Furthermore, the court held that the tax imposed by the Watch Production Quota Act and its amendment was not "an export duty" but "essentially an excise tax levied on the production of watches in the Virgin Islands, a process local in nature and complete in itself." (App. 15a) In reaching this conclusion, the court brushed aside the contention that the tax act's "purpose and effect were solely to curtail the shipments to the United States of watches produced in the Virgin Islands." (App. 19a) According to the court below:

> [A]ll that the statute did in mandatory terms was to impose a tax upon the local production of watches at two rates, a low rate upon watches produced within the limited quotas fixed under the Act (and in the original Act on two other minor categories) and a high rate on watches produced in excess of these amounts. While, as we have seen, the Legislature undoubtedly hoped that the imposition of the tax would discourage manufacturers from producing for future shipment to the United States more watches than the quota amounts, it did not actually forbid such production or shipment which all manufacturers remained free to engage in if they chose to do so. (App. 20a-21a)

Characterizing the regulatory purpose and effect of the tax act as "collateral," the court concluded that the discriminatory tax rates were not "so palpably arbitrary and unreasonable as to amount to a denial of due process of law." (App. 21a-22a)

The court, relying on *United States* v. *E. C. Knight Co.*, 156 U.S. 1 (1895), further decided that the watch quota tax did not constitute a burden upon interstate

commerce on the premise that "commerce follows after manufacture and is not a part of it." (App. 22a)[7]

In disposing of the tax exemption issue, the court below acknowledged that the record showed that Virgo had "fully met the objective criteria required of applicants by the Act" (App. 27a), but it held that the Governor nevertheless could deny the exemption where, in his opinion, the applicant's business does not require the stimulus of such governmental assistance. (App. 27a-28a) The fact that "four similarly situated competitors" of Virgo had been granted the exemption, the court said, did not constitute a denial of equal protection of the laws in violation of the bill of rights contained in section 3 of the revised Organic Act, 48 U.S.C. § 1561. (App. 28a-29a)

REASONS FOR GRANTING THE WRIT

Over twelve years ago, in *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1 (1955), this Court reviewed the legislative authority of the Virgin Islands under the 1936 Organic Act and said that Congress did not intend " to give the Virgin Islands Legislative Assembly power to do what no State has ever attempted." (*Id.* at 16) The decision below, in conflict with *Granville-Smith,* holds that the Virgin Islands' taxing and regulatory powers over commerce with the States exceeds those which the States may exercise under the Constitution. Furthermore, the decision conflicts with leading precedents of this Court interpreting the Commerce Clause. This case, therefore, raises questions

[7] In addition, the court below passed on and "rejected" Virgo's claim that the Governor improperly allocated quotas among the watch manufacturers, even though the District Court had neither tried nor decided the disputed facts involved in this claim. (App. 23a-24a)

of fundamental importance regarding the powers of the territories to tax and regulate the free flow of commerce to the continental United States.

The enactment of P.L. 89-805, whereby Congress now regulates the quantity of watches shipped from the territories to the United States, in no way lessens the importance of these questions. For the issue here is whether a territorial government itself has the power to regulate this flow of commerce. Indeed, the Virgin Islands continues to regulate and tax the flow of wool products to the United States under a production quota tax statute virtually identical to the Watch Production Quota Act. (See 33 V.I.C. §§ 501-508)

The decision below also raises the important question of whether the territorial governments may make administrative decisions on grounds not provided for by applicable statutes in order to discourage the enactment by Congress of legislation which they disapprove. In light of the manifest importance of the questions presented, as well as the future impact of the decision, review by this Court is clearly warranted.

I.

Section 36 of the Organic Act of 1936 (48 U.S.C. § 1406i) expressly prohibits the Government of the Virgin Islands from imposing any new export duties on goods shipped to the United States or elsewhere. Specifically, the section provides "[t]hat no new export duty shall be levied in the Virgin Islands except by the Congress."

Incredibly, the court below upholds the quota tax on the proposition that it is an "excise" tax rather than an "export" tax, because it was levied on the production of watches, "a process local in nature

and complete in itself," and "not upon their transmission out of the Virgin Islands." (App. 15a) In the words of the court: "The controlling fact is that the tax is attached while the watches were in the process of their manufacture and before their sale and possible export. It follows that the taxes imposed under the Watch Production Act were not export duties." (App. 17a)

This reasoning process falsely elevates form above substance and conflicts with the settled precedents of this Court that the constitutionality of a state taxing law is determined by "the ultimate effect of the law as applied and enforced by a State." *American Oil Co.* v. *Neill,* 380 U.S. 451, 455 (1965). As this Court stated in that case: "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form." (*Ibid.*)[8]

Here there has never been any question about the purpose or practical effect of the watch quota tax imposed by the Virgin Islands. As admitted by the Study Committee and the Governor (CA 80b-98b),[9] and freely acknowledged in testimony before Congress

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[8] For additional authorities on this point, see the decisions of this Court discussed in the District Court's second opinion at App. 61a-62a.

[9] See also the testimony of Study Committee members Feldman (CA 52b-53b), deCastro (CA 67b-68b), Prendergast (CA 73b) and the letter of Committee member Kirwin, who wrote, on the day the Committee Report was issued, "that the Virgin Islands Governor is presently working . . . to arrange for local legislation which would allow him to fix, in result though not in form, an ironclad (figuratively speaking) quota on watch shipments from the Virgin Islands." (CA 99b-100b)

(CA 113b-124b),[10] the specific purpose and effect of the quota tax was to limit watch shipments to the United States. To accomplish this result the statute imposed a two-level tax system, with a $2.50 rate on watches shipped to the United States in excess of fixed quotas and a 3¢ rate on all other watches, whether sold in the Virgin Islands or elsewhere. The higher rate was deliberately set at a level which made it economically unprofitable to assemble watches in the Virgin Islands for trans-shipment to the United States. (CA 116b-120b) The direct effect of the quota law, therefore, was to prevent all watch shipments to the United States in excess of the established quotas. (See the District Court's findings, App. 38a-41a)

In view of these undisputed facts, for the court below even to suggest that the statute "did not actually forbid" the production or shipment of watches in excess of the quotas, and that "all manufacturers remain free to engage in [such productions and shipments] if they chose to do so" (App. 21a), ignores the prac-

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[10] See Governor Paiewonsky's testimony before the Senate Finance Committee. (CA 116b-120b) In its Report, the Senate Finance Committee, referring to the watch quota tax legislation, said: "In an effort to control the watch assembly operations and to forestall congressional legislation . . ., the Virgin Islands Legislature, on August 30, 1965, enacted legislation . . . designed to limit watch assembly there for export to the United States to a quantity roughly equivalent to one-ninth of total apparent U.S. watch consumption for the preceding year." Senate Rep. No. 1679, 89th Cong., 2d Sess. 5 (1966)

See also the Report of the House Ways and Means Committee (CA 124b) and respondents' own admission that "the Governor's Committee recommended that the shipment of watches to the United States be controlled by a system of quotas on the local producers" and that the quota act "imposed" the $2.50 tax only on watches "to be exported to the United States" in excess of the fixed quotas. (CA 28b-29b)

tical realities of the situation. The "excise" label cannot save an otherwise invalid tax.

If the reasoning of the court below is accepted, then any territory, or even a state or local government, could control the movement of goods out of a territory or state by simply imposing a discriminatory tax on production or some other incident prior to shipment outside the territory or state. But, of course, this Court has never permitted such artificial distinctions to govern in determining the validity of taxing laws.[11]

II.

It is well-settled constitutional doctrine that a discriminatory taxing scheme which impedes the free flow of commerce among the states is invalid if it places an undue burden upon interstate commerce. See, *e.g.*, *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389 (1952); *Nippert* v. *Richmond*, 327 U.S. 416 (1946). Indeed, this Court has held that a state may not engage in taxation or regulation which discriminates against interstate commerce even when the state purportedly acts under its police powers and seeks to protect local business such as milk producers. Thus, in *Hood* v. *DuMond*, 336 U.S. 525 (1949), this Court, after tracing its long record of condemning economic restraints on interstate commerce for local economic advantage, stated that a state's "lack of power to retard, burden or constrict the flow of such commerce for their economic advantage is one deeply rooted in both our history and our law." (*Id.* at 533)

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[11] Unlike *Toyota* v. *Territory of Hawaii*, 226 U.S. 184 (1912), relied upon by the court below (App. 22a), there is, in the instant case, no basis for the two-level classification of the quota tax except to place an arbitrary limit on the number of watches shipped to the United States.

This Court has made it clear that the constitutional proscription against discriminatory taxation which acts as an undue burden on interstate commerce is applicable to the territories as well as the States. *Mullaney* v. *Anderson,* 342 U.S. 415 (1952). In that case, an Alaskan statute providing for the licensing of commercial fishermen in territorial waters and levying a license fee of $50 on non-residents and only $5 on resident fishermen was held void as an undue burden on interstate commerce. This Court rejected the argument that the constitutional limitation on placing undue burdens on interstate commerce was not applicable to the territories, stating: "Only the clearest expression of Congressional intent could induce such a result." (342 U.S. at 420) This Court, therefore, upheld the Court of Appeals decision where, as here, it had been argued that the taxable event (*i.e.,* the taking of fish) occurred before the goods had entered the flow of commerce. "It is true," the Court of Appeals said, "that the taking of the fish is a local incident, but if the tax in its practical operation has a discriminatory impact upon some aspect of interstate commerce, the local tax cannot be sustained by simply tying it to a local incident." (191 F.2d 123, 129)

The court below, however, held that the quota tax did not constitute an undue burden on commerce because, it reasoned, the tax was imposed "on the production of watches within the Virgin Islands, a process essentially local in character and complete in itself." (App. 22a) To reach this result, the Court, resurrecting the *E. C. Knight* decision, held:

> It is settled that commerce follows after manufacture and is not a part of it. *United States* v. *E. C. Knight Co.,* 1895, 156 U.S. 1, 12. In other words, commerce does not begin until after manu-

facture is finished, and hence the commerce clause does not prevent a state from exercising exclusive control over the manufacture. (App. 22a)

The court below erred in relying upon such outmoded concepts of interstate commerce. Surely it can no longer be contended that manufacturing is not part of commerce. See, *e.g., Mandeville Is. Farms* v. *American C. S. Co.*, 334 U.S. 219, 230, n. 9 (1948), where the Court lists a long series of its decisions rejecting the artificial manufacturing/distribution distinction of *Knight*. As this Court made clear in *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949): "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." The decision below thus would turn the clock back over half a century by reverting to repudiated concepts of what constitutes commerce. If allowed to stand, it would authorize the Virgin Islands and the other territories to regulate commerce with the States by enacting discriminatory taxes on the manufacturing of goods destined for shipment out of the territories. Indeed, the Virgin Islands continues to regulate the flow of wool to the United States by a tax quota act virtually identical to the Watch Production Quota Act. (See App. 39a; CAE 83b)

III.

The Court of Appeals sought to escape the specific limitation imposed by Congress on the powers of the Territorial Legislature by claiming that the prohibition contained in Section 36 (*i.e.*, Section 1406i of Title 48, U.S.C.)[12] of the Organic Act of 1936 was no longer in

[12] The last part of that Section of the Organic Act provides: "That no new export duties shall be levied in the Virgin Islands except by the Congress." (App. 87a)

effect because the 1954 revision of the Organic Act repealed "by implication" the entire 1936 Organic Act. This is plain error. First of all, the 1954 revision specifically provided that "*the provisions of Sections 1405-1405s, and 1405x-1406m of this title* [*Title* 48] . . . *shall continue in force and effect.*"[13] (Emphasis supplied) In view of this express saving provision covering section 1406i, the result reached by the court below based on the theory of implied repeal defies comprehension.[14]

Moreover, the legislative history of Congressional revisions of the organic legislation of the Virgin Islands shows that Congress refused to repeal Section 1406i despite the fact that the Circuit Judge who wrote the opinion below personally urged Congress to do so. In 1958 Congress considered further revision of the organic legislation of the Virgin Islands, including a provision that would expressly repeal the Organic Act of 1936. According to the House Report of the Committee on Interior & Insular Affairs, the proposed

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[13] The 1954 Organic Act, 48 U.S.C. § 1574(c), provides:

> The laws of the United States applicable to the Virgin Islands on July 22, 1954, included laws made applicable to the Virgin Islands by or pursuant to the provisions of Sections 1405-1405s, and *1405x-1406m of this title,* and all local laws and ordinances in force in the Virgin Islands, or any part thereof, on July 22, 1954, shall, to the extent they are not inconsistent with this chapter, Sections 104 and 111 of Title 21, and Section 3350(c) of Title 26, *continue in force and effect* until otherwise provided by the Congress . . . . (emphasis added).

There were further amendments to the Organic Act in 1958 and 1963, but none of them affected the continued vitality of Section 1406i.

[14] Significantly, this line of argument, which the court below adopted as the ground of its decision, was neither urged nor suggested by respondents in this proceeding.

repeal was directed in particular to cover Section 36 (*i.e.*, Section 1406i of Title 48, U.S.C.) and to transfer jurisdiction over duties and customs matters from the U. S. Treasury Department to the Territorial Legislature. (App. 71a) The U. S. Treasury Department objected to this proposed repeal, pointing out that there would be no established agency available to enforce the Federal customs laws unless other appropriate legislation was enacted. (The letter from Treasury is reprinted in the appendix to the petition for rehearing at pp. 5a-8a)

On March 14, 1957, Circuit Judge Maris submitted a letter to the House Committee advocating the proposed repeal of the 1936 Organic Act. (App. 71a-73a) He stated: "The failure of the Revised Organic Act [of 1954] to repeal its predecessor of 1936 was an inadvertence which has caused confusion as to the present status of the organic law of the Territory. This section would rectify this error with an appropriate interim proviso with respect to Section 36 of the old act." (App. 73a) The Senate Report, however, relying on the objections raised by the Treasury Department, deleted the proposed repeal, and the legislation, as finally enacted by Congress, contained no provision repealing the Organic Act of 1936. (App. 74a-77a)

Obviously, the repeal-by-implication ground of the decision is wholly without merit and contrary to the facts of legislative history; and in no event is there to be found here that "clearest expression of Congressional intent" which this Court has held to be required before a territory can exercise legislative power such as that exercised by Virgin Islands under the Watch Production Quota Act. See *Mullaney* v. *Anderson, supra* at 420.

Contrary to the decision below (App. 12a-14a), such power cannot be implied from the fact that Congress in 1958 changed the legislative authority of the Virgin Islands from "all subjects of local application" to "all rightful subjects of legislation" to equate the Virgin Islands with Alaska and Hawaii. By this change Congress did not grant the Territorial Legislature any greater authority to regulate interstate commerce than that possessed by the States. See *Granville-Smith* v. *Granville-Smith, supra* at 16; *Mullaney* v. *Anderson, supra* at 420. Indeed, the Ninth Circuit's decision in *Mullaney* v. *Anderson* (affirmed by this Court) specifically ruled that the extension of legislative authority in the Alaskan organic act to "all rightful subjects of legislation" did not authorize the Territorial Legislature to impose burdens on commerce between the Territory and the State, stating: "But we cannot conceive that in granting legislative power to the Territorial Legislature it was intended that the power should exceed that possessed by the legislature of a State in dealing with commerce." (191 F.2d at 128)

IV.

As part of an overall plan to avoid a conflict with the watch industry on the mainland, the Governor of the Virgin Islands denied Virgo a tax exemption under the Industrial Incentive Act. That Act provides that companies meeting five specific requirements shall be entitled to certain tax exemptions. (33 V.I.C. §§ 4001, 4041, 4051, 4052) Although there is no dispute that Virgo met all of these five specific criteria, and despite the fact that other watch manufacturers in the Virgin Islands who had also met the five criteria were granted exemptions under the Act, Virgo's application for an exemption was held in abeyance for three years because, as Virgo was informed by the Virgin Islands

Industrial Incentive Board, "a controversy exists over our watch industry in regards to its effect on the mainland." (CAE 17b)[15] After the District Court twice ordered the Industrial Incentive Board to take appropriate action to determine whether Virgo was entitled to the same tax exemption accorded competing watch companies under the Act, the Board found that Virgo had met all the statutory criteria and recommended to the Governor that Virgo be granted an exemption. The Governor, however, denied Virgo an exemption, purportedly because it did "not require the stimulus of governmental assistance as provided for by the law." (CAE 37b-38b)

The Governor's action denying the exemption deprived Virgo of due process and equal protection under the laws. *Sioux City Bridge Company* v. *Dakota County,* 260 U.S. 441 (1923); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *International Business Machines Corporation* v. *United States,* 343 F.2d 914 (Ct. Cl. 1963), *cert. denied* 382 U.S. 1028 (1966).

The denial was not made for any statutory reasons. The Act sets forth the criteria under which a company's qualification must be determined. *Vitex Manufacturing Co.* v. *Government of Virgin Islands,* 351 F.2d 313 (3d Cir. 1965). Nowhere does the Act re-

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[15] Respondents stated in their brief before the District Court:

> *In the hope of discouraging any further Congressional action* to amend Headnote 3(a), *the Governor* of the Virgin Islands undertook to preserve the economic interest of the Virgin Islands in the preservation of the watch industry by two measures: (1) *the withholding of further tax exemptions for watch firms, particularly the freedom from the equivalent of the Federal Income Tax;* (2) the appointment, on May 9, 1965, of a Special Committee to make recommendations as to what steps should be taken to maintain the insular industry without undue adverse effects on mainland production. (CA 27b-28b) (emphasis supplied)

quire a showing by an applicant that its operations "require the stimulus of governmental assistance." Moreover, the record demonstrates that the decision to deny Virgo an exemption was based purely on political considerations, including pressure on the Governor by his superiors in the Department of Interior resulting from the "controversy" which existed with regard to the watch industry on the mainland. The Governor's action thus raises an important constitutional question of whether territorial governments are, as are other governmental bodies, required to base administrative determinations upon statutory standards, or whether they may make such decisions on an *ad hoc* basis in order to avoid "political" controversies and to discourage Congressional enactment of legislation of which they disapprove. *Morgan* v. *United States,* 298 U.S. 468 (1936); *United States* v. *Shaughnessy,* 347 U.S. 260 (1954); *Harmon* v. *Brucker,* 355 U.S. 579 (1958).

V.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1968.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16116

VIRGO CORPORATION

v.

RALPH M. PAIEWONSKY, Governor, MORRIS F. deCASTRO, Director of the Budget and the GOVERNMENT OF THE VIRGIN ISLANDS,

Appellants

No. 16133

MASTER TIME COMPANY, LTD.

v.

PERCY deJONGH, as Commissioner of the Department of Finance of the Government of the Virgin Islands,

Appellant

No. 16374

VIRGO CORPORATION

v.

RALPH M. PAIEWONSKY, Governor, MORRIS F. deCASTRO, Secretary, Governor's Committee on the Virgin Islands Watch Industry, Member, Virgin Islands Industrial Incentive Board, and Director of the Budget; ALBERT PRENDERGAST, Member, Governor's Committee on the Virgin Islands Watch Industry, Chairman,

Virgin Islands Industrial Incentive Board, and Commissioner of Commerce; PERCY DEJONGH, Commissioner of the Department of Finance; RUBEN WHEATLEY, Member, Virgin Islands Industrial Incentive Board and Director of Tax Division of Department of Finance; MAHLEN LINDQUIST, Member, Virgin Islands Industrial Incentive Board; ADOLPH POTTER, Member, Virgin Islands Industrial Incentive Board; JOSEPH ALEXANDER, Member, Virgin Islands Industrial Incentive Board; PERCY GARDINE, Member, Virgin Islands Industrial Incentive Board; the GOVERNMENT OF THE VIRGIN ISLANDS, and ATLANTIC TIME PRODUCTS CORPORATION,

Appellants

APPEALS FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX

Argued at Christiansted February 3, 1967

Before STALEY, *Chief Judge,* and MARIS and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed September 29, 1967)

By MARIS, *Circuit Judge.*

These are appeals by the defendants from judgments entered against them in the District Court of the Virgin Islands. The appeals at our docket Nos. 16116, 16133 and 16374 involve the validity of the Watch Production Act of 1965, as originally enacted and as amended, 33 V.I.C. §§ 511-518, which inter alia, imposed taxes on the production of watches in the Virgin Islands and also involve the validity

of the Governor's action in allocating quotas to watch manufacturers under the Act. The appeal at our docket No. 16374 raises, also, the question whether the Governor acted arbitrarily in denying the plaintiff Virgo Corporation tax exemption and subsidy benefits under the Virgin Islands industrial incentive program, 33 V.I.C. §§ 4001 et seq.

Virgo Corporation, a Virgin Islands corporation engaged in the business of manufacturing and selling watches, filed a complaint in the district court, at Civil Docket No. 165-1965, Division of St. Croix, against the Government of the Virgin Islands, its Governor, and certain of its other officers, and Atlantic Time Products Corporation. The complaint set out two separate claims for relief. The first was for a determination that the Governor had acted arbitrarily in making an allocation to Atlantic Time Products Corporation, a newly established watch manufacturer, from the reserve quota of 300,000 units established under the Watch Production Act while denying Virgo an allocation of 45,000 additional watches from the reserve quota to relieve it from severe financial hardship. Virgo sought a judgment declaring that the Governor's allocation of 240,000 units to Atlantic Time was invalid and that Virgo was entitled to the allocation of the additional 45,000 units which it had requested. In the alternative, Virgo asked that the entire watch production program and the taxes imposed by the Watch Production Act of 1965 be declared invalid. Virgo's second claim for relief was for a judgment declaring it entitled to tax exemption and subsidy benefits under the Virgin Islands industrial incentive program, 33 V.I.C. §§ 4001 et seq. The district court, after hearing, filed its opinion holding the Watch Production Act of 1965 to be invalid on the ground that it imposed a new export duty in violation of section 36 of the Organic Act of 1936, 49 Stat. 1816-1817. In respect to count two of the complaint, the court concluded that the case should be remanded to the Virgin Islands Industrial Incentive Board with directions that recommendations which the Board deemed proper

should be made to the Governor within 30 days, that the Governor should act thereon within a reasonable time thereafter; and that if no action was taken within the time prescribed, Virgo could seek an order compelling the defendants to grant tax exemption and subsidy benefits to it. 5 V.I. 342, 251 F. Supp. 279. The court entered an order pursuant to its opinion on March 16, 1966 from which the defendant appealed to this court at our docket No. 15894. That appeal was, however, dismissed by this court as premature since the Industrial Incentive Board had not yet acted and a final decision on all the claims for relief had accordingly not yet been rendered.

By the Watch Production Act of August 30, 1965,[1] the Legislature sought to discourage through taxation the production of watches[2] destined for ultimate shipment to the United States in amounts in excess of one-ninth of the annual consumption of watches in the United States. For the six months period from October 1, 1965 to March 31, 1966, the Governor of the Virgin Islands was authorized by the Act to assign to watch manufacturers in the Virgin Islands production quotas totaling 1,800,000 units. A tax of $2.50 per watch was imposed on all watches produced in the Virgin Islands upon which tax a credit of $2.47 was to be allowed in the case of all watches manufactured within the quota allocated and watches not destined for the United States. The Governor was authorized to allocate 1,500,000 of the total quota of 1,800,000 units to Virgin Islands manufacturers in accordance with a formula set out in the Act. The remaining 300,000 units were to be reserved to relieve severe financial hardship, and to permit allocation to new manufacturers. The Watch Production Act of 1965 was

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[1] Act of August 30, 1965, No. 1518, V.I. Sess. L. 1965, pp. 470 et seq.; 33 V.I.C. §§ 511-518.

[2] The term "watches" includes watches, clocks and timing apparatus.

amended by the Act of March 22, 1966.[3] Under the Act, as amended, the tax of $2.50 per watch was imposed upon all watches produced in the Virgin Islands in excess of the quotas to be allocated by the Governor for manufacture by Virgin Islands manufacturers, which were to aggregate one-ninth of the total annual consumption of watches within the customs area of the United States. Watches manufactured within these quotas were to be taxed at 3 cents per watch only.

After the passage of the Act of 1966 Virgo brought a second suit in the district court against the Government of the Virgin Islands, its Governor, and the Director of the Budget, at Civil Docket No. 37-1966, Division of St. Croix, for a judgment declaring the amended Act invalid in that it violated section 36 of the Organic Act of 1936 and section 28(d) of the Revised Organic Act of 1954. The district court held that the statute, as amended, continued the export duty in violation of section 36 of the Organic Act of 1936. 5 V.I. 359, 254 F. Supp. 405. Judgment was entered accordingly in favor of Virgo on June 3, 1966 and an appeal by the defendants at our docket No. 16116 followed.

In compliance with the district court's order of March 16, 1966, the Virgin Islands Industrial Incentive Board held a hearing and recommended to the Governor that partial tax exemption be granted to Virgo. This recommendation the Governor disapproved, however, and he denied Virgo's application for benefits under the industrial incentive program. Virgo then moved in the district court for an order to compel the defendants to grant it the benefits it had applied for. The district court held that it was the legislative intent that tax exemption and subsidies be made available to Virgo if it complied with the requirements of the statute and that after such compliance no discretionary power remained in the Governor to deny it benefits under

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[3] Act of March 22, 1966 No. 1631, V.I. Sess. L. 1966, pp. 98 et seq.

the program. 5 V.I. 417, 259 F. Supp. 26. Accordingly, on November 7, 1966 the court entered an order directing the Governor to issue a certificate granting Virgo the same tax exemptions and subsidy benefits which had been granted to four other watch companies. The defendants thereupon took an appeal at our docket No. 16374 from the orders of March 16, 1966 and November 7, 1966.

Master Time Company, Ltd., a Virgin Islands corporation engaged in the manufacture and sale of watches, brought suit against the Commissioner of the Department of Finance of the Government of the Virgin Islands, at Civil Docket No. 142-1965, Division of St. Croix, for a judgment declaring the Watch Production Act invalid as imposing a prohibited export duty upon goods coming into the United States. On the basis of its conclusions in the actions brought by Virgo, the district court entered judgment in this action in favor of Master Time. 5 V.I. 388, 255 F. Supp. 927. The defendant then took the appeal at our docket No. 16133.

The three appeals now before us, insofar as they relate to the Watch Production Act, raise similar questions. They were consolidated for argument and will be considered together in this opinion. The issues which they raise are (1) whether the Watch Production Act, as originally enacted or as amended, is invalid as imposing an export tax on watches shipped to the United States in excess of the production quotas established under the Act or is otherwise invalid, or (2) if the district court erred in holding the Act invalid, whether the allocation made by the Governor from the reserve quota to Atlantic Time Products Corporation resulted from such non-statutory considerations and improper influences as to render the allocation void. The district court held, and the plaintiffs urge, that the Watch Production Act as amended by the Act of 1966 contained no changes from the original Act which were of legal significance in respect of the issues of validity involved in these

appeals. We agree and accordingly will not consider separately the Act as originally enacted in 1965 and as amended in 1966.

I. Validity of the Watch Production Act.

The district court held that the Watch Production Act, both as originally enacted and as amended, was invalid because it imposed an export duty upon watches exported from the Virgin Islands to the customs area of the United States in violation of section 36 of the Organic Act of the Virgin Islands of June 22, 1936, 48 U.S.C.A. § 1406i, which the court held to be still in force. That section provided as follows:

> "SEC. 36. Taxes and assessments on property and incomes, internal-revenue taxes, license fees, and service fees may be imposed and collected, and royalties for franchises, privileges, and concessions granted may be collected for the purposes of the Government of the Virgin Islands as may be provided and defined by the municipal councils herein established: *Provided,* That all money hereafter derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury of the Virgin Islands and paid out for such purpose only, except when otherwise authorized by the legislative authority having jurisdiction after the purpose for which such fund was created has been accomplished. Until Congress shall otherwise provide, all laws concerning import duties and customs in the municipality of Saint Thomas and Saint John now in effect shall be in force and effect in and for the Virgin Islands: *Provided,* That the Secretary of the Treasury shall designate the several ports and sub-ports of entry in the Virgin Islands of the United States and shall make such rules and regulations and appoint such officers and employees as he may deem necessary for the administration of the customs laws in

the Virgin Islands of the United States; and he shall fix the compensation of all such officers and employees and provide for the payment of such compensations and other expenses of the collection of duties, fees and taxes imposed under the customs laws from the receipts thereof. The export duties in effect on the date of enactment of this Act may be from time to time reduced, repealed, or restored by ordinance of the municipal council having jurisdiction: *Provided further,* That no new export duties shall be levied in the Virgin Islands except by the Congress." 49 Stat. 1816-1817.

It will be observed that except for the authority conferred upon the Secretary of the Treasury to administer the customs laws of the Virgin Islands, section 36 of the Organic Act of 1936 dealt solely with certain specified powers of the legislative authorities, the municipal councils and the legislative assembly, which the Act created, and with certain limitations upon those powers. Thus the last sentence of the section, upon which the district court relied, dealt solely with the power of the municipal councils to reduce, repeal or restore existing export duties and by a proviso to that grant of power imposed the condition that no new export duties should be levied except by the Congress.

On July 22, 1954 the Congress enacted a Revised Organic Act for the Virgin Islands, 68 Stat. 497, 48 U.S.C.A. §§ 1541 et seq. The Revised Organic Act declared the Virgin Islands to be an unincorporated territory, and completely reorganized its government, abolishing the two existing municipalities with their separate municipal councils and joint legislative assembly, and creating a single territorial government with a single legislature. The Act made comprehensive and complete provisions for the legislative, executive and judicial branches of the government, defining their powers and duties and imposing many specific limitations upon them. In the report of the Senate Commit-

tee on Interior and Insular Affairs upon the bill, S. 3378, 83d Congress, which became the Revised Organic Act, it is stated:

> "The purpose of S. 3378 is to provide a new organic act, or basic charter of civil government, for the people of the Virgin Islands of the United States. The present act dates from 1936 and is based in no small part on the old Danish colonial system in the islands, which was evolved before the days of modern communication. Substantial changes, political and economical, have taken place in the Virgin Islands in the 18 years since the first somewhat makeshift organic legislation was put together, and under modern conditions the 1936 law is proving unnecessarily cumbersome and inefficient as well as expensive for the mainland taxpayers.
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> . . .
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> "S. 3378 would eliminate much of this wasteful duplication in governments and governmental services, thus affording the islands more efficient and more truly representative government. At the same time, it would give a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands." S. Rept. 1271, 83d Cong., pp. 1, 2; 2 U.S. Code, Cong. & Admin. News, 1954, pp. 2585, 2586.

There thus appears to be a clear legislative intent that the Revised Organic Act should become a new basic charter of government for the territory to take the place of the "somewhat makeshift" Organic Act of 1936 which had proved "unnecessarily cumbersome and inefficient" and that the new Act should grant "a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands". In many respects the Revised Organic Act parallels the Organic Act of 1936. But in a great many other instances the provisions of the revised Act diverge

from the provisions of the former Act with respect to similar subject matter. We find no indication in the Revised Organic Act that the Congress intended any part of the Act of 1936 to remain in force after the Revised Organic Act took effect, except those provisions of the Act of 1936 which had made certain laws of the United States applicable to the Virgin Islands.[4] This saving provision, which appears in section 8(c) of the Revised Organic Act, 48 U.S.C.A. § 1574(c), is the only reference in that Act to the Act of 1936.

It is, of course, clear that those provisions of the Act of 1936 which were inconsistent with provisions of the Revised Organic Act were repealed by implication by the latter Act. It is equally true, we believe, that those provisions of the old Act which dealt with and limited the powers of organs of the former municipalities, such as the municipal councils, fell with the abolition of the organs of government to which they related. There is no reason to believe that the Congress, which was intent on providing a greater degree of autonomy to the people of the territory through a newly created territorial legislature, intended to shackle that legislature with restrictions which had been placed in 1936 upon the municipal councils as the direct successors of the old Danish colonial councils but which the Congress had omitted from the revised Act. Quite the contrary was indicated by the Congress when in section 8(c) of the revised Act it provided:

> ". . . That the legislature shall have power, when within its jurisdiction and not inconsistent with the other provisions of this Act, to amend, alter, modify, or repeal any local law or ordinance, public or private,

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[4] There is an indication in the legislative history, as noted later in this opinion, that the House of Representatives, at least, intended that the provisions of section 36 of the 1936 Act, which authorized the Secretary of the Treasury to administer the Virgin Islands customs laws should be saved from repeal.

civil or criminal, continued in force and effect by this Act, except as herein otherwise provided, and to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands, subject to the power of Congress to annul any such Act of the legislature." 68 Stat. 501.

We think, moreover, that in conferring upon the people of the Virgin Islands a new and up-to-date charter of government the Congress could not have intended at the same time to impose upon them the well-nigh impossible task of sorting out those provisions of the old Act which were so inconsistent with the new Act as to be repealed by it from those provisions of the old Act which were to remain in force because they were not sufficiently inconsistent with the new law.[5] The very fact that the Act of 1954 is described in its title as "An Act to revise the Organic Act of the Virgin Islands of the United States" and in its first section as the "Revised Organic Act of the Virgin Islands" indicates that it was intended to supersede and take the place of the Organic Act of 1936 and not merely to amend or repeal portions of it.

It is true that the Revised Organic Act did not expressly repeal the Act of 1936. But in the light of the legislative history of the Act we do not regard this as of controlling significance. For it appears that when the bill, S. 3378, which became the Act of 1954, passed the Senate on May 17, 1954 it contained a section reading as follows:

"SEC. 34. Except to the extent necessary to implement the provisions of section 35, the Act of June 22,

[5] The report of the commission appointed under the authority of section 8(d) of the Revised Organic Act would not be helpful in this regard. For the task of that commission was to determine which general statutes of the United States should be applicable to the Virgin Islands as well as to the rest of the country and which should be declared inapplicable to the Virgin Islands. The commission was not concerned with statutes, such as the organic acts, which were applicable to the Virgin Islands alone.

1936 (49 Stat. 1807), and any other provisions of law inconsistent with this Act are hereby repealed." 100 Cong. Rec. 6654.

When S. 3378 came before the House of Representatives on June 22, 1954, the bill was passed by the House after it had substituted in section 34 the following language:

"SEC. 34. Except to the extent necessary to implement the provisions of section 31 hereof and except with reference to the authority of the Secretary of the Treasury under section 36 of the Act of June 22, 1936 (49 Stat. 1807), said act and other provisions of law inconsistent with this act are hereby repealed." 100 Cong. Rec. 8673.

It will thus be seen that except for three specific provisions, both Houses clearly expressed in precise language their intention to repeal the Act of 1936. Nonetheless, although except as to the three provisions referred to in the language above quoted the two Houses were in agreement on the repeal of the Act of 1936, the bill reported from the Conference Committee of the two Houses which became the Revised Organic Act did not contain an express repealing section. No explanation of this omission appears in the statement of the House Conferees or anywhere else in the legislative history and it well may be that it was omitted inadvertently in the pressure of legislative business or that it was deemed unnecessary in view of the purpose of the Act and its structure as a complete revision of the organic law.

It thus seems clear that the Revised Organic Act of 1954 operated to repeal the Organic Act of 1936. But even if it be assumed that the Revised Organic Act did not have this effect there is another basis for concluding that the legislative power of the Virgin Islands Legislature is not limited by the provisions of section 36 of the Organic Act

of 1936 which restricted the legislative power of the former municipal councils. When originally enacted the Revised Organic Act of 1954 described the legislative authority and power of the Virgin Islands which it vested in the newly created Legislature in section 8(a) as follows:

> "SEC. 8(a). The legislative authority and power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands, . . ." 68 Stat. 500.

This grant of power was identical with that contained in section 19 of the Organic Act of 1936. 49 Stat. 1811. However, following the decision of the Supreme Court in Granville-Smith v. Granville-Smith, 1955, 349 U.S. 1, the Congress by the Act of August 28, 1958, Pub. L. 85-851, sec. 2, amended the foregoing language of section 8(a) to read as follows:

> "The legislative authority and power of the Virgin Islands shall extend to all rightful subjects of legislation not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands, . . ." 72 Stat. 1094.

The purpose of this amendment was stated in the report of the Senate Committee on Interior and Insular Affairs upon the bill, H.R. 12303, which became the Act of August 28, 1958, as follows:

> "Section 2 amends section 8(a) of the existing law under which Territorial legislature's power extends 'to all subjects of local application.' The amendment would make this read: 'to all rightful subjects of legislation.' In *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1 (1955), the Supreme Court held that, at least with respect to persons who are not permanent residents of the islands, the phrase 'subjects of local

application' has a meaning narrower than the phrase 'rightful subjects of legislation.' The latter language is used in the Organic Acts of Alaska and Hawaii.

"The committee is of the opinion that the term 'rightful subjects of legislation' is well known in the law, and its application to the legislative power of the Territory should prevent the development of a jurisdictional no man's land where neither Federal nor Territorial law can apply. Under the language of section 2 of the bill, the legislative jurisdiction of the Territory would cover the ordinary area of sovereign legislative power as limited and circumscribed by the Revised Organic Act or the laws of the United States made applicable to the Virgin Islands. The Congress retains, of course, the power to disapprove, modify, and supersede any and all acts of the Territorial legislature." S. Rept. 2267, 85th Cong., p. 2; 3 U.S. Code, Cong. & Admin. News, 1958, p. 4335.

It thus appears that the purpose of the amendment was to broaden the legislative power of the Virgin Islands to cover "the ordinary area of sovereign legislative power" limited only by the provisions of the Revised Organic Act and laws of the United States made applicable to the Virgin Islands. By the latter phrase, of course, is meant those federal statutes applicable to the United States generally which, either by their own terms or by other legislation, are also made applicable to the Virgin Islands. There is no intimation in the amendatory Act or in the committee report that the broader legislative power granted by the amendment was to be limited by provisions of the Organic Act of 1936 which had not been carried over into the Revised Organic Act. Indeed the language used in the report indicated the contrary. It follows that the presently existing power of the Virgin Islands Legislature to deal with all rightful subjects of legislation is not limited by the provisions of section 36 of the Organic Act of 1936.

The precise question to which we address ourselves at this point is whether the limiting proviso of the final sentence of section 36 of the Organic Act of 1936 was operative in 1965 and 1966 to render invalid the enactment by the Legislature of the Watch Production Act and its amendatory Act, assuming that the tax which these Acts levied was an export duty. For the reasons which we have stated we conclude that it was not operative as a limitation upon the power of the Legislature in those years and that the district court erred in holding that it operated to invalidate the Watch Production Act of 1965 and the amendatory Act of 1966.

We think, furthermore, that the district court was wrong in regarding the tax imposed by the Watch Production Act and its amendment as an export duty. For the tax was essentially an excise tax levied on the production of watches in the Virgin Islands, a process local in nature and complete in itself. Articles do not acquire the character of exports while still in the manufacturing process and before they enter the stream of commerce. The tax on the production of watches was aimed at a matter of local concern and was imposed on the manufacture of those articles, not upon their transmission out of the Virgin Islands. The Supreme Court has defined the export process to be the act of carrying or sending abroad, as follows:

> "To export means to carry or send abroad; to import means to bring into the country. Those acts begin and end at water's edge. The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would hauling them to or from distant points or perhaps mining them or manufacturing them. The

phase of the process would make no difference so long as the goods were in fact committed to export or had arrived as imports.'' Canton Railroad Co. v. Rogan, 1951, 340 U.S. 511, 515.

What the Supreme Court said in Empresa Siderurgica v. Merced County, 1949, 337 U.S. 154, 156-157, is applicable here:

"'. . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.' *Coe* v. *Errol*, 116 U.S. 517, 527. That test was fashioned to determine the validity under the Commerce Clause of a nondiscriminatory state tax. But as we noted in *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 79, it is equally applicable to cases arising either under Art. I, § 10, Cl. 2 (the Import-Export Clause) or under Art. I, § 9, Cl. 5, which prohibits Congress from laying any tax on 'Articles exported from any State.'

"Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . . . Delivery of packages to an exporting carrier for shipment abroad . . . and the delivery of oil into the hold of the ship furnished by the foreign purchaser to carry the oil abroad . . . have been held sufficient. It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and

will not be diverted to domestic use. Nothing less will suffice.

> "So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. . . ."

This test is applicable in the cases now under review. The watches produced in the Virgin Islands when subjected to the taxes imposed under the Watch Production Act had not ceased to be part of the general property within the Territory subject to its taxation. The controlling fact is that the taxes attached while the watches were in the process of their manufacture and before their sale and possible export. It follows that the taxes imposed under the Watch Production Act were not export duties.

Both Virgo and Master Time further urge that the Watch Production Act was invalid because it violated section 28(d) of the Revised Organic Act which, as amended by section 402(a) of the Customs Simplification Act of September 1, 1954, provided:

> "All articles coming into the United States from the Virgin Islands shall be subject to or exempt from duty as provided for in section 301 of the Tariff Act of 1930 and subject to internal-revenue taxes as provided for in section 7652(b) of the Internal Revenue Code of 1954." 68 Stat. 1140.

Section 301 of the Tariff Act of 1930 as added by the Customs Simplification Act of 1954, sec. 401, 68 Stat. 1139-1140, was concerned only with the duty upon articles imported from insular possessions, including the Virgin Islands, outside the customs territory of the United States and provided that articles grown, manufactured or produced in any such possession which did not contain foreign

materials to the value of more than 50% of their total value should be exempt from duty. Section 301 was repealed by the Tariff Classification Act of 1962, 76 Stat. 72, 75, and these provisions now appear in paragraph 3(a) of the general headnotes and rules of interpretation to the Tariff Schedules of the United States published by the President, 28 F.R. 8625, 77A Stat. 11.

Paragraphs (1) and (2) of section 7652(b) of the Internal Revenue Code of 1954 provide:

> "(b) Virgin Islands.—
>
> "(1) Taxes imposed in the United States.—Except as provided in section 5314, there shall be imposed in the United States, upon articles coming into the United States from the Virgin Islands, a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture.
>
> "(2) Exemption from tax imposed in the Virgin Islands.—Such articles shipped from such islands to the United States shall be exempt from the payment of any tax imposed by the internal revenue laws of such islands."

Paragraph (3) of section 7652(b) provides for the payment over to the Government of the Virgin Islands of substantial amounts, computed as therein provided, of the taxes collected by the Secretary of the Treasury under paragraph (1) on articles coming to the United States from the Virgin Islands.

It is perfectly clear that the provisions of paragraph (a) of general headnote 3 of the Tariff Schedules of the United States, concerning rates of duty on products of insular possessions have no bearing on the present question. This is equally true, we think, of the provisions of section 7652(b) of the Internal Revenue Code. For the obvious purpose of paragraph (2) of that subsection is to

insure that articles coming from the Virgin Islands to the United States which are taxed in the United States under paragraph (1) shall not also be taxed in the Virgin Islands. The purpose, in other words, was to prohibit double taxation of the same article. The use in paragraph (2) of the word "Such" in the phrase "Such articles shipped from such islands to the United States" makes it clear that the reference is only to those articles shipped from the Virgin Islands to the United States which are described as taxable in paragraph (1). It is not suggested that internal revenue taxes are imposed in the United States upon the domestic manufacture of watches, clocks and timing apparatus. We conclude, therefore, that the Watch Production Act is not invalid by reason of section 28(d) of the Revised Organic Act.

There can be no question as to the power of the legislature of the Virgin Islands to impose an excise tax upon the manufacture of watches in the Territory. The power to impose taxes is a part of the legislative power granted by the Revised Organic Act to the territorial legislature and it has always been recognized as a rightful subject of legislation. H. I. Hettinger & Co. v. Municipality of St. Thomas & St. John, 3 Cir. 1951, 2 V.I. 509, 187 F.2d 774; Port Construction Co. v. Government of Virgin Islands, 3 Cir. 1966, 5 V.I. 549, 558-559, 359 F.2d 663, 667-668. The plaintiffs urge, however, that this particlular taxing statute was not a rightful subject of legislation because its purpose and effect were solely to curtail the shipment to the United States of watches produced in the Virgin Islands in numbers in excess of one-ninth of the total United States consumption of watches, and thereby to forestall Congressional action which might render impossible the continuance of the Virgin Islands watch industry. It is certainly true that the Legislature had this possibility in mind in enacting the statute. The record is abundantly clear as to this. Section 301 of the Tariff Act of 1930, as added in 1954, permitted articles manufactured in the Virgin Islands with

foreign materials to be admitted duty-free into the United States, provided the value of the foreign materials incorporated into the article did not exceed 50% of the total value of the article. Under this Congressional authority an industry was started in 1959 in the Virgin Islands of assembling watches with foreign materials not exceeding 50% of their finished value and exporting them to the United States duty-free. 4,900 watches were produced in the first year but by 1964 the Virgin Islands production had grown to 2,400,000 units, approximately 9% of the annual watch consumption of the United States. This rapid growth in shipments of duty-free watches from the Virgin Islands came to be regarded by the watch manufacturers of the United States as a serious threat to their industry. Proposals were made in Congress of legislation to terminate the duty-free importation of watches from the Virgin Islands. This possibility greatly concerned the Virgin Islands Legislature which authorized the Governor to study the problem and prepare recommendations. It was pursuant to the Governor's recommendation, made after study by a special committee which he appointed, that the Legislature passed the Watch Production Act of 1965.

It is thus clear that one of the purposes of the Legislature in enacting the Watch Production Act was to discourage the production of watches in the Virgin Islands in quantities so large that their subsequent flooding of the United States market might bring about Congressional withdrawal of the duty-free importation privilege and the consequent destruction of the local industry by this elimination of its principal economic support. But this is not to say that the legislation was invalid as dealing with a prohibited subject. For all that the statute did in mandatory terms was to impose a tax upon the local production of watches at two rates, a low rate upon watches produced within the limited quotas fixed under the Act (and in the original Act on two other minor categories) and a high rate on watches produced in excess of these amounts.

While, as we have seen, the Legislature undoubtedly hoped that the imposition of the tax would discourage manufacturers from producing for future shipment to the United States more watches than the quota amounts, it did not actually forbid such production or shipment which all manufacturers remained free to engage in if they chose to do so.

A taxing statute is not invalidated by the fact that it has a collateral purpose and is designed to have a regulatory effect which the legislature desires to achieve. In Magnano Co. v. Hamilton, 1934, 292 U.S. 40, 47, the Court said:

> "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."

And, to the same effect, see United States v. Sanchez, 1950, 340 U.S. 42, 44, in which case the Court said:

> "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible, . . . or the revenue purpose of the tax may be secondary, . . ."

These principles are controlling here. The taxes here involved were imposed upon all watches produced within the Virgin Islands by Virgin Islands manufacturers, a legitimate exercise of the taxing power of the Legislature, despite its collateral regulatory purpose and effect. We cannot say that the low tax of 3 cents on watches within the quota as contrasted with the much higher tax of $2.50 imposed on watches produced in excess of the quota was so palpably arbitrary and unreasonable as to amount to a denial of due

process of law. Compare, for example, the $600 license fee imposed by the Territory of Hawaii on a person engaged in the occupation of auctioneer in the district of Honolulu with the $15 fee imposed in other taxation districts, which was upheld by the Supreme Court as not being an arbitrary classification or discriminatory as between persons engaged in the same occupation in the Territory of Hawaii. Toyota v. Hawaii, 1912, 226 U.S. 184.

Nor can we agree with the plaintiffs that the tax on the production of watches in the Virgin Islands was a burden on interstate commerce. The tax in question was imposed, as we have seen, on the production of watches within the Virgin Islands, a process essentially local in character and complete in itself. It is settled that commerce follows after manufacture and is not a part of it. United States v. E. C. Knight Co., 1895, 156 U.S. 1, 12. In other words, commerce does not begin until after manufacture is finished, and hence the commerce clause does not prevent a state from exercising exclusive control over the manufacture. Utah Power & Light Co. v. Pfost, 1932, 286 U.S. 165, 181. Accordingly, the tax on the production of watches in the Virgin Islands was not a tax directly burdening interstate commerce, even though most of the watches taxed were destined for subsequent transportation to the mainland.

We conclude that the Watch Production Act of 1965, both as originally enacted and as amended in 1966,[6] was a rightful subject of legislation within the authority delegated by Congress to the Virgin Islands Legislature and did not violate the commerce clause of the Constitution or the due process clause of the Revised Organic Act.

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[6] We note as a matter of interest, although it has no bearing on these appeals, that the Act was repealed by the Act of January 27, 1967, No. 1835, as of January 1, 1967, the effective date of the Act of Congress of November 10, 1966, P.L. 89-805, 80 Stat. 1521, which placed a limit upon the number of watches containing foreign components to be admitted from the Virgin Islands to the United States free of duty.

II. Validity of the Governor's Allocation of Quotas.

In its original suit in the district court at No. 165-1965, Division of St. Croix, Virgo attacked the validity of the action of the Governor in awarding to a new manufacturer, defendant Atlantic Time Products Corporation, 240,000 units out of the 300,000 units reserved by the Watch Production Act, as originally enacted, to be granted by the Governor "to relieve against severe financial hardship, and to permit allocation to new manufacturers." 33 V.I.C. § 512. Virgo also attacked the Governor's action in refusing an additional allocation of 45,000 units to it from the reserve units to relieve it from severe financial hardship.

It appears that the Governor considered the applications of Virgo and others for hardship allocations of additional units as well as the applications of Atlantic Time and other new manufacturers for quota allocations and on September 16, 1965 entered an order denying the applications of Virgo and certain other existing manufacturers for allocations of additional units because of alleged severe financial hardship and granted the applications of Atlantic Time and certain other new manufacturers for production quotas. In his order the Governor stated that the requests of Virgo and others for hardship quotas "shall not be considered at this time as they are all beneficiaries of regular quotas which were issued on September 9, 1965 out of the 1,500,000 units fixed by Act No. 1518 for manufacturers who have had a continuous record of production since October 1, 1964." With respect to the quotas requested by Atlantic Time and two other new manufacturers he said: "That the requests for quotas for new manufacturers are hereby approved in the quantities stated below for the following companies now in production based on present investment, employment, and other factors and criteria as provided by Act No. 1518:

Watches Incorporated	5,000 units
Atlantic Time Products Corporation	240,000 units
Virgiline Watch Company, Inc.	24,000 units."

Subsequently on October 20, 1965 the Governor allotted the remaining 31,000 units of the statutory reserve to another new manufacturer Belmont Industries, Inc.

The Watch Production Act provided that in making grants out of the reserve amount the Governor should give special weight to the "maintenance and promotion of employment" and to "the complete assembly of watches from individual component parts and other characteristics of production contributing special value to the Virgin Islands." The Governor was also to take into account, but was not limited to the consideration of, the following factors: investment in plant and equipment for watchmaking in the Virgin Islands, minimum quantities required for production without loss, and abnormal or unforeseeable economic circumstances. 33 V.I.C. § 515. It is clear that while indicating certain factors for his consideration the Act vested in the Governor a very wide discretion in the evaluation of these and all other factors in determining, in the interest of the economic stability and commercial relations of the Virgin Islands, the appropriate allocation of the reserve units. The record indicates that the Governor did consider a wide range of factors in finding that the interests of the Virgin Islands required that the entire reserve should be allotted to new manufacturers and that existing manufacturers alleging hardship did not have an equal claim to it. Under the express terms of the Act this finding is final and unreviewable except upon a conclusive showing that it was arbitrary or fraudulent. 33 V.I.C. § 518. We have carefully examined the voluminous record but find nothing which would support Virgo's contention that the Governor's finding in this regard was arbitrary or fraudulent. Virgo's contention that the Governor's allocation of 240,000 units to Atlantic Time Products Corporation was invalid and that he should have allocated 45,000 units to it must accordingly be rejected.

III. Virgo's Claim for Tax Exemption and Subsidy Benefits.

In its suit in the district court at Docket No. 165-1965, Division of St. Croix, Virgo also sought a declaration that it was entitled to tax exemption and subsidy benefits under the Virgin Islands industrial incentive program, 33 V.I.C. §§ 4001 et seq., or, in the alternative, an order directing the Virgin Islands Industrial Incentive Board and the Governor to take appropriate action on its application for tax exemption and subsidy benefits. As we have seen the court ordered the Board to consider the application and make recommendations to the Governor. The Board thereupon recommended a partial tax exemption which the Governor disapproved for the reason, stated in his letter of disapproval of September 16, 1966, "that the corporation, as evidenced by its substantial profit return, does not require the stimulus of governmental assistance as provided for by the law." The district court on November 7, 1966 entered the order directing the Governor to grant tax exemption and subsidy benefits which is one of the orders now before us for review. We are satisfied that the Governor acted within his discretionary power in denying Virgo's application and that the district court erred in holding to the contrary and in ordering him to grant it.

Section 4001(a) of the Industrial Incentive Act, 33 V.I.C. § 4001(a), states it to be the policy of the Government of the Virgin Islands that "tax exemption and subsidy benefits be made available for the promotion of such industrial or business activities as may be determined will promote the public interest by economic development of the Virgin Islands, and the establishment or expansion of which *require the stimulus of such governmental assistance.*" [Emphasis supplied.] It was in the exercise of his judgment as to the applicability of the criterion embodied in the final clause above quoted that the Governor denied Virgo's application. The truth of his finding that Virgo

did not require the financial stimulus provided by tax exemption and subsidy benefits is not challenged in this record. On the contrary Virgo's contention is that the clause in question had somehow been repealed by inference by the Act of April 1, 1964, V.I. Sess. L., p. 65, which deleted certain phrases from other sections of the Act. We find this argument wholly unconvincing.

Virgo also contends that when it made application for benefits under the industrial incentive program and made the showing required by the Act, a contractual obligation immediately arose on the part of the Government of the Virgin Islands to grant it those benefits, which obligation the district court properly enforced by its order. In support of this proposition Virgo cites our decision in Vitex Manufacturing Co. v. Government of Virgin Islands, 3 Cir. 1965, 5 V.I. 429, 351 F.2d 313. However in the Vitex case a wholly different situation was presented. There a certificate granting tax exemption and subsidy benefits had been issued to Vitex, which under the statute did become a contractual obligation of the government, and the question involved in the case was whether, the grant having been made, its subsequent revocation had been in accordance with the law.

The question involved in the present case was answered by this court in Pentheny, Ltd. v. Government of Virgin Islands, 3 Cir. 1966, 5 V.I. 575, 360 F.2d 786. In that case we had occasion to consider whether vested rights to tax exemption and subsidies were acquired by the mere application therefor. While the rights claimed in the Pentheny case arose under the Act of July 5, 1957, No. 224, V.I. Sess. L., p. 146, a predecessor of the statute here under consideration, the provisions upon which the applicant in that case relied were in terms substantially similar to the provisions in the present Act. In that case, it will be recalled, the applicant had invested substantial amounts of capital to construct an office building. During the pendency of the appli-

cation a new statute, Act No. 798, V.I. Sess. L. 1961, p. 251, became effective which omitted persons engaged in the business of constructing or operating commercial buildings from the category of those who could apply for benefits under the industrial incentive program. This court held that final disposition of a pending application did not take place until the Governor acted upon it, until which time the applicant did not have an order which could be judicially reviewed, and that although the Act of 1957 held forth a possibility of tax exemption and industrial subsidy benefits, the plaintiff had not acquired any vested right thereto merely by applying for them. We referred to the distinction made by the Supreme Court in Wisconsin & M.R. Co. v. Powers, 1903, 191 U.S. 379, between an exemption from taxation contained in a special charter, which would be equivalent to the order or certificate granting tax exemption and subsidies under the industrial incentive program, and an exemption offered as general encouragement to all persons to engage in a certain class of enterprise. And, we continued, "The court stated that the latter was addressed to no one in particular and constituted a mere announcement of policy, not a contract, . . . 'a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement, or bounty, holding out a hope but not amounting to a covenant.'" 5 V.I. 575, 581-582, 585; 360 F.2d 786, 789-790, 791-792.

Under the industrial incentive program there are two separate considerations involved in granting tax exemption and subsidy benefits to newly established enterprises in the Virgin Islands. First, it must appear that the applicant has fully met the objective criteria required of applicants by the Act. But also it must appear that the applicant's business or industry will promote the public interest by economic development of the Virgin Islands and that its establishment or expansion will require the stimulus of the assistance authorized by the Act. Since the basic purpose

of the industrial incentive program was to advance the economic development of the Virgin Islands, grants of public funds or property to private persons to assist in the establishment or support of an enterprise must be to the advantage of the public. Such grants are necessarily closely articulated with the purposes of the program and are not intended as mere gratuities or bounties. King Christian Enterprises v. Government of Virgin Islands, 3 Cir. 1965, 5 V.I. 170, 345 F.2d 633; Dorem Corporation v. Government of the Virgin Islands, 3 Cir. 1966, 5 V.I. 503, 358 F.2d 693, In re Hooper's Estate, 3 Cir. 1966, 5 V.I. 518, 528-530, 359 F.2d 569, 575-576. It is, therefore, only if and when the Governor, upon considering the Board's recommendations, finds that both sets of criteria have been met and issues a certificate granting benefits under the program that a contractual obligation arises. It follows that the district court erred in holding that Virgo had an enforceable contract. Virgo further argues that the Governor improperly denied plaintiff's application as a result of political considerations. The short answer to this contention is that the Governor stated in writing the reasons for his action, which adequately supported it, and political considerations were not among them. We cannot look into the Governor's mental processes nor speculate as to what they were.

Finally, it is contended that the non-issuance of a certificate of tax exemption and subsidy benefits when such benefits had previously been granted to four similarly situated competitors of the plaintiff was a denial of equal protection of the laws in violation of the bill of rights contained in section 3 of the Revised Organic Act, 48 U.S.C.A. § 1561. We had occasion in Port Construction Co. v. Government of Virgin Islands, 1966, 5 V.I. 549, 558-559, 359 F.2d 663, 667-668, to observe that the equal protection clause does not impose a rigid rule of equality of taxation. It does not prohibit those inequalities which may result from singling out one particular class for taxation or exemption there-

from. Only if it appears that there is no rational basis for the classification so that it is patently arbitrary may it be set aside as unconstitutionally discriminatory. Even singling out a group of taxpayers for special relief conditioned upon a showing of individual hardship is not necessarily invalid. Jefferson Constr. Overseas, Inc. v. Government of V.I., 3 Cir. 1966, 5 V.I. 543, 359 F.2d 668. Accordingly, the Government of the Virgin Islands is not bound to grant benefits under the industrial incentive program to all who apply for such benefits merely because it had earlier encouraged the establishment of other similar industries by granting such benefits to them. The expressed legislative intent in establishing the program was "to promote the economic development of the Virgin Islands by the offering of certain incentives to the establishment or expansion of industries or businesses." 33 V.I.C. § 4001(a). But it does not follow that once such a benefit has been granted to a certain type of business or industry a procession of similar industries may follow in its train. On the contrary, the Board and the Governor are entitled to consider each applicant on his individual merits in the light of the extent to which his business or industry will promote the public interest by economic development of the Virgin Islands. 33 V.I.C. §§ 4041, 4104. We conclude that the district court erred in setting aside the decision of the Governor denying the plaintiff the tax exemption and subsidy benefits and ordering him to grant them.

The judgments and orders appealed from will be reversed and the causes remanded with directions to dismiss the complaints.

APPENDIX B

Judgments of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16,116

VIRGO CORPORATION, a Virgin Islands Corporation

v.

RALPH M. PAIEWONSKY, Governor, MORRIS F. DECASTRO, Director of the Budget, and the GOVERNMENT OF THE VIRGIN ISLANDS, *Appellants*

(D. C. Civil Action No. 37-1966)

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX, CHRISTIANSTED JURISDICTION

Present: STALEY, *Chief Judge*, and MARIS and FREEDMAN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 3, 1966, be, and the same is hereby reversed, with costs, and the cause remanded with directions to dismiss the complaint.

ATTEST:

THOMAS F. QUINN
Clerk

September 29, 1967

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16,374

VIRGO CORPORATION, a Virgin Islands Corporation

v.

RALPH M. PAIEWONSKY, Governor, MORRIS F. deCASTRO, Secretary, Governor's Committee on the Virgin Islands Watch Industry, Member, Virgin Islands Industrial Incentive Board, and Director of the Budget; ALBERT PRENDERGAST, Member, Governor's Committee on the Virgin Islands Watch Industry, Chairman, Virgin Islands Industrial Incentive Board, and Commissioner of Commerce; PERCY deJONGH, Commissioner of the Department of Finance; RUBEN WHEATLEY, Member, Virgin Islands Industrial Incentive Board and Director of Tax Division of Department of Finance; MAHLEN LINDQUIST, Member, Virgin Islands Industrial Incentive Board; ADOLPH POTTER, Member, Virgin Islands Industrial Incentive Board; JOSEPH ALEXANDER, Member, Virgin Islands Industrial Incentive Board; PERCY GARDINE, Member, Virgini Islands Industrial Incentive Board; the GOVERNMENT OF THE VIRGIN ISLANDS, and ATLANTIC TIME PRODUCTS CORPORATION, a Virgin Islands Corporation, *Appellants*

(D. C. Civil Action No. 165-1965)

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX, CHRISTIANSTED JURISDICTION

Present: STALEY, *Chief Judge*, and MARIS and FREEDMAN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed March 16, 1966 and November 7, 1966, be, and the same are hereby reversed, with costs, and the cause remanded with directions to dismiss the complaint.

ATTEST:

THOMAS E. QUINN
Clerk

September 29, 1967

APPENDIX C

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,116

VIRGO CORPORATION, a Virgin Islands Corporation

v.

RALPH M. PAIEWONSKY, Governor, MORRIS F. deCASTRO, Director of the Budget and THE GOVERNMENT OF THE VIRGIN ISLANDS, *Appellants*

No. 16,374

VIRGO CORPORATION, a Virgin Islands Corporation

v.

RALPH M. PAIEWONSKY, Governor, MORRIS F. deCASTRO, Secretary; Governor's Committee on the Virgin Islands Watch Industry, Member, Virgin Islands Industrial Incentive Board, and Director of the Budget; ALBERT PRENDERGAST, Member, Governor's Committee on the Virgin Islands Watch Industry, Chairman, Virgin Islands Industrial Incentive Board, and Commissioner of Commerce; PERCY deJONGH, Commissioner of the Department of Finance; RUBEN WHEATLEY, Member, Virgin Islands Industrial Incentive Board and Director of Tax Division of Department of Finance; MAHLEN LINDQUIST, Member, Virgin Islands Industrial Incentive Board; ADOLPH POTTER, Member, Virgin Islands Industrial Incentive Board; JOSEPH ALEXANDER, Member, Virgin Islands Industrial Incentive Board; PERCY GARDINE, Member, Virgin Islands Industrial Incentive Board; the GOVERNMENT OF THE VIRGIN ISLANDS, and ATLANTIC TIME PRODUCTS CORPORATION, a Virgin Islands Corporation, *Appellants*

SUR PETITION FOR REHEARING

Present: STALEY, *Chief Judge*, and MARIS, MCLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN, SEITZ and VAN DUSEN, *Circuit Judges*.

The petition for rehearing filed by Virgo Corporation in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
MARIS
Circuit Judge

Dated: November 7, 1967

APPENDIX D

District Court's First Opinion

DISTRICT COURT, VIRGIN ISLANDS
D. ST. CROIX

Civ. No. 165-1965

VIRGO CORPORATION, a Virgin Islands Corporation,
Plaintiff,

v.

RALPH M. PAIEWONSKY, Governor of the Virgin Islands, et al., *Defendants.*

March 14, 1966

Howrey, Simon, Baker & Murchison, Washington, D. C., Russell B. Johnson, Christiansted, V. I., for plaintiff; William Simon and J. Coleman Bean, Washington, D. C., of counsel.

Francisco Corneiro, Atty. Gen. of Virgin Islands, Charlotte Amalie, V. I., for defendants.

W[illiam]ER A. GORDON, District Judge.

On February 15, 1966, the plaintiff in the above entitled civil action brought on for hearing a motion for summary judgment and a motion for a preliminary injunction. The arguments on the above motions consumed the whole day and at the conclusion of the hearing the Court took the motions under advisement. Because of the serious questions raised, the Court deems it necessary to set forth its opinion in detail.

The plaintiff, a Virgin Islands corporation, filed the above entitled civil action in this Court against the defendants on November 18, 1965. The nature of the complaint was for a declaratory judgment and an injunction. The complaint was brought in two counts. In the first count of the complaint the plaintiff challenges the validity, legality and con-

stitutionality of Title 33 Virgin Islands Code §§ 511-518 which is commonly known as the Watch Production Quota Act. In the second count of the complaint the plaintiff challenges the administration by the Virgin Islands Industrial Incentive Board and the Governor of the Virgin Islands of the tax exemption and subsidy provisions of Title 33 Virgin Islands Code § 4001 et seq. The Court will discuss each count separately in order not to confuse the facts and the law with respect to the pending motions.

With respect to the motion for summary judgment as to count one of the complaint in which the plaintiff challenges the Watch Production Quota Act, the plaintiff made the following contentions:

1. The Act is a burden on interstate commerce and is thus unconstitutional.

2. The Virgin Islands Legislature only has authority to enact legislation which is authorized by the Organic Act of the Virgin Islands. The Legislature had no authority to enact the Watch Production Quota Act because the Act was in contravention of the Organic Act of the Virgin Islands of the United States. [48 U.S.C.A. § 1406i]

3. The Act unfairly discriminates between competitors and thus is in violation of the due process clause of the Constitution of the United States.

4. Assuming the constitutionality of the Act, the Act has been administered arbitrarily by the Governor.

5. Reserve allocations granted by the Governor were as a result of improper influence.

The defendants in opposition to the motion contended:

1. The Virgin Islands Legislature was acting within its province in enacting the Watch Production Quota Act.

2. The Court should not question the economic judgment of the Legislature.

3. Because the Virgin Islands is an unincorporated territory which has its own Bill of Rights, the Constitution of the United States is not applicable to the Virgin Islands.

4. The tax imposed by the Act is local and therefore does not hinder interstate commerce.

The following are the material uncontroverted facts with regard to count one of the complaint:

The plaintiff is a Virgin Islands corporation with its principal place of business at Frederiksted, St. Croix, Virgin Islands. Plaintiff manufactures watches in the Virgin Islands and sells those same watches in interstate and foreign commerce. Plaintiff is a wholly owned subsidiary of Timex, Limited, a Bermuda company, and is affiliated with and sells its entire production of watches to United States Time Corporation, a Connecticut corporation.

Plaintiff commenced its watch manufacturing in St. Croix in June, 1963 with a capital investment in excess of $300,000. It employs approximately 32 people with an annual income of approximately $100,000.

In August, 1965 the Legislature of the Virgin Islands in special session enacted bill number 2638 which added sections 511 to 518 to Title 33 Virgin Islands Code. The Governor of the Virgin Islands on August 30, 1965 approved this bill and it became effective as Act No. 1518. The provisions of this Act relevant to this controversy are:

a. Section 511 imposes a tax of $2.50 on each watch manufactured in the Virgin Islands for sale or use in the customs area of the United States. This section further provides that if the number of watches sold in the United States does not exceed the quota allocated to the manufacturer, then the tax shall be 3¢ instead of $2.50 per watch. On all other watches manufactured and sold, either in the Virgin Islands or outside the customs area of the United States, the tax is only 3¢ per watch.

b. Section 512 establishes a quota of 1,800,000 watches to be manufactured in the Virgin Islands *for export to the customs area of the United States* during the six-month period from October 1, 1965 to March 31, 1966.

c. Section 513 provides that for each twelve-month period subsequent to March 31, 1966, *the Governor shall allocate among the watch manufacturers in accordance with the formula provisions of Section 514(b) "such number of units as shall total 1/9 of annual consumption" in the customs area of the United States.* The section further provides that, of the total units to be allocated, five percent "shall be reserved as a quantity to supplement quotas allocated to manufacturers and to relieve against severe financial hardship, in accordance with the provisions of Section 515." (Emphasis supplied)

The history of this enactment would be most helpful in visualizing what will follow.

Under Paragraph (a) of General Headnote 3 of the Tariff Schedules of the United States [19 U.S.C.A. § 1202] articles produced in insular possessions, which includes the Virgin Islands, may enter the United States duty free if the articles do not contain foreign materials to the value of more than 50 percent of their total value. This tariff concession was made by Congress to help encourage economic development in the insular possessions and territories of the United States.

In the last five to six years, the watch assembly industry has developed rapidly in the Virgin Islands as a result of the tariff concessions which permit the assembled watches to enter the United States duty free. In 1964 approximately 9 percent or 2,400,000 watch movements consumed in the United States were assembled by eleven watch manufacturers in the Virgin Islands.

Because of the so-called flood of watches from the Virgin Islands to the United States, manufacturers of watches in the United States were lobbying in Congress to amend the tariff laws to stop Virgin Islands-made watches from entering the United States duty free.

In order to head off any action by the Congress, the Legislature of the Virgin Islands on June 25, 1964 passed Resolution Number 293 which stated:

> "WHEREAS the continued ability of this industry to contribute to the economy of the Virgin Islands is partly dependent on the structure of the United States tariff laws with regard to the entry of watches and related products from the Virgin Islands and from foreign countries; and
>
> • • • • •
>
> WHEREAS the Legislature of the Virgin Islands is anxious to preserve for the people of the Virgin Islands and those who have invested substantial amounts in its economy the benefits of the watch manufacturing industry without inflicting undue injury on mainland manufacturers and their employees; Now, Therefore, be it
>
> RESOLVED by the Legislature of the Virgin Islands:
>
> SECTION 1. That it is the intention of the Legislature of the Virgin Islands to take such steps as may be necessary to alleviate the conditions that have led mainland manufacturers to request congressional action including the imposition of production taxes of the sort now imposed on the woolen textile industry by Section 501-508 of Title 33 of the Virgin Islands Code on the manufacture of clocks, watches, and watch movements. The Legislature believes that such action may prove necessary to the protection of the interests of the Virgin Islands watch industry and its employees.
>
> • • • • •

SECTION 3. That, in the interim, the Governor study the situation and prepare recommendations on this subject to the Legislature in light of such developments as may occur."

In compliance with the above resolution the Governor of the Virgin Islands appointed a special committee to make recommendations with regard to preserving the Virgin Islands watch industry. On August 9, 1965, the special committee submitted its report to the Governor of the Virgin Islands. The committee found "that the present rate of expansion in watch manufacturing holds great dangers to the stability of employment in the Islands and the Islands' commercial relations". It recommended that a $2.50 production tax be placed on all watches manufactured in the Islands. It also recommended that quotas be set for watches shipped to the United States. John J. Kirwin, a member of the special committee, testified on deposition that one of the things that was kept in mind at public hearings and meetings of the committee was to control the volume of watch production in the Virgin Islands to forestall adverse legislation from the Federal Congress. [Deposition of John J. Kirwin, December 22, 1965]

Following the recommendations of the special committee, the Legislature of the Virgin Islands enacted Bill No. 2638 which was approved by the Governor of the Virgin Islands on August 30, 1965. (Supra)

Preliminarily, the Court will not decide the motion of the plaintiff for summary judgment on the constitutional issues raised, the issue with regard to improper influence upon the Governor or the issue of arbitrary action on the part of the Governor. The sole issue upon which this motion will be decided is whether the Watch Production Quota Act (Act No. 1518) was in violation of the Organic Act of the Virgin Islands of the United States [June 22, 1936, ch. 699, § 36, 49 Stat. 1816, 48 U.S.C.A. § 1406i] which provides "[t]hat

no new export duties shall be levied in the Virgin Islands except by Congress."

Section 36 of the Organic Act of the Virgin Islands of the United States has not been repealed even though there has been a subsequent act called the "Revised Organic Act of the Virgin Islands." [July 22, 1954, ch. 558, § 1, 68 Stat. 497] Therefore, it is still the law that the Legislature of the Virgin Islands has no power to levy new export duties.

The determination which will have to be made is whether the watch production tax is an export duty. An export tax has been defined by the Supreme Court of the United States in Coe v. Town of Errol, 116 U.S. 517, 526, 6 S.Ct. 475, 29 L.Ed. 715, and in Turpin v. Burgess, 117 U.S. 504, 506, 6 S.Ct. 835, 29 L.Ed. 988, as a tax levied upon the right to export, or upon goods because of the fact that they are being exported or intended to be exported.

From the history of the Act and from the express provision of the Act, supra, it can be seen that the primary purpose of the Act was to limit the exportation of watches from the Virgin Islands to the "Customs area of the United States", to forestall the necessity of the Congress taking away the tariff concessions which the Virgin Islands watch manufacturers enjoyed. There can be no other interpretation of the Watch Production Quota Act than it being an export duty upon watches entering the "customs area of the United States". Such an export duty can only be levied by Congress. From this it follows that the Act is in contravention of § 36 of the Organic Act of the Virgin Islands of the United States, [June 22, 1936, ch. 699, 49 Stat. 1816, 48 U.S.C.A. § 1406i] and is thus illegal.

For the reasons cited above the motion of the plaintiff for summary judgment is hereby granted because there are no material issues of fact which must be determined by the fact finder. Rule 56, Federal Rules of Civil Procedure.

With reference to the motion for summary judgment as to count two of the complaint in which the plaintiff alleges that the Virgin Islands Industrial Incentive Act has been administered in a discriminatory manner, the plaintiff made the following contentions:

1. Similarly situated watch manufacturers presently enjoy tax benefits, thus the failure of the defendants to act on plaintiff's petition discriminates against plaintiff.

2. The plaintiff has complied with all the provisions of the Industrial Incentive Act and thus as a matter of law the Court should order that the plaintiff be granted tax benefits under the Industrial Incentive Act.

The defendants in opposition to the motion for summary judgment as to count two of the complaint contended:

1. The application of the plaintiff was deemed disapproved in November, 1963 and because the appeal period has expired, the Court lacks jurisdiction to entertain this action with respect to the Industrial Incentive Act.

2. The plaintiff is not entitled to the benefits of the Industrial Incentive Act as a matter of right because no contractual obligation exists.

The material facts with regard to count two of the complaint are as follows:

On June 12, 1963 before plaintiff commenced operations in St. Croix, plaintiff filed a formal application with the Virgin Islands Industrial Incentive Board reciting all pertinent information requested by the statute. On September 16, 1963 plaintiff filed a supplemental application attesting to the fact that operations had commenced and listing other pertinent information. On September 17, 1963 public hearings were held with respect to plaintiff's application.

On December 9, 1964, the Industrial Incentive Board through its executive officer notified plaintiff that:

> "As you may be aware, a controversy exists over our watch industry in regards to its effect on the

mainland. Because of this, all applications were ordered "frozen" by the Governor and he directed that no further action be taken until the matter is clarified. At the time of this directive by Governor Paiewonsky, a few watchmaking firms had already been granted tax exemption and these grants could not be impaired, but the directive did act as a halt on all applicants still under consideration. This accounts for the apparent disparity among the watch firms. As you can see, however, there was no prejudice or arbitrary action involved. It was simply a matter of not impairing any benefits already granted, but nevertheless withholding the granting of any subsequent benefits until a clean bill of health could be given the industry as a whole.

Recently the Governor has written the Board and proposed an interim relief handling of the firms whose applications are being held in abeyance until the cloud is lifted. Due solely to an overloaded agenda this latter proposal has not been considered as yet by the Board.

This office has again scheduled the watch companies' problem for consideration at the next Executive Session and it is our hope that this time it will be discussed and resolved relative to the issue whether the suggested interim relief can or can not be granted.

In any event, this is the status as to date and should anything at all relative to the subject arise, we shall inform you immediately as to its outcome."

Since December 9, 1964 despite requests of plaintiff for interim relief no action was taken by the Industrial Incentive Board with respect to plaintiff's application for tax exemption and subsidy.

On November 18, 1965 the plaintiff brought this action invoking the jurisdiction of this Court pursuant to Title 33 Virgin Islands Code § 4113 which provides:

> "Any person, firm or corporation aggrieved by any action of the Governor under the provisions of this subtitle shall be entitled to judicial review thereof by filing an appeal with the District Court of the Virgin Islands, within 30 days after final decision by the Governor. Upon such review all findings, decisions or determinations by the Governor as to questions of fact shall be deemed final is the absence of conclusive showing to the Court of fraud or misrepresentation."

The Court recognizes that there has been no final decision by the Governor. However, the plaintiff has been aggrieved by the inaction of the Industrial Incentive Board caused by the Governor's freeze on watch manufacturers' applications. The Court is, however, of the opinion that the facts alleged by the plaintiff in its complaint and motion are sufficient to invoke this Court's jurisdiction under Title 5 Virgin Islands Code § 1261 et seq. which is the Uniform Declaratory Judgment Act.

The Court does not agree with defendants' contention that plaintiff's application was denied on November 17, 1963 by operation of law. It is inconceivable to the Court that the Government can lull an applicant into believing that its application is being entertained in the regular course of business and then when the "moment of truth" arrives, advise applicant that its application had been deemed to have been disapproved without notice to the applicant. 33 Virgin Islands Code § 4101(b). In the case at bar the plaintiff was advised that its application was being considered by the Virgin Islands Industrial Incentive Board. Later it was advised by an official of the Industrial Incentive Board that the Governor had ordered a "freeze" on all pending watch manufacturers' tax exemption and subsidy applications. In the opinion of the

Court the action of the Governor by his directive is an extension as contemplated by Title 33 Virgin Islands Code § 4101(b).

The Court would like to comment briefly on defendants' contention that plaintiff has not complied with the statutory requirements for tax exemption and is thus not entitled to the Industrial Incentive benefits as a matter of right. Defendants argue that they have no contractual obligation to issue a tax exemption to plaintiff. It is difficult for the Court to adhere to such a contention when Title 33 Virgin Islands Code § 4001 makes it clear as its policy that an industrial or business activity which has met the statutory requirements and which may be determined to promote the public interest by economic development of the Virgin Islands and the establishment or expansion of which requires the stimulus of governmental assistance will be entitled to the benefits of the Act. It is also difficult to adhere to the defendants' argument that the plaintiff's activities do not promote the economic development of the Virgin Islands when it is the same activities with respect to the watch industry which defendants tried to protect by enacting the Watch Production Quota Act. The record is replete with Resolutions of the Virgin Islands Legislature, Acts of the Virgin Islands Legislature, and reports of committees which state that the watch industry is of great benefit to the economy of the Virgin Islands and need to be protected in order to further contribute to the economy of the Virgin Islands. If an industry is of economic benefit to the Virgin Islands, then the individuals or companies which make up that industry must of necessity benefit the Virgin Islands' economy.

It would seem to the Court that if four other watch manufacturers who have received tax exemption and subsidy certificates have been deemed to promote the economic welfare of the Virgin Islands, the plaintiff, as long as it has fulfilled all the statutory requirements, should also be deemed to promote the economic welfare of the Virgin

Islands and should thus be granted a tax exemption and subsidy certificate.

The Court realizes that tax exemption is not merely a question of law, but involves many economic factors which are more appropriately the function of those to whom this decision is entrusted, which in the case at bar is the Virgin Islands Industrial Incentive Board and the Governor of the Virgin Islands. However, the Court will not sit idly by and permit those officials who are entrusted to carry out their duties fail to assume those responsibilities given to them by the Legislature of the Virgin Islands.

The Court is of the opinion that the defendants should not be permitted to refuse to entertain plaintiff's application "because the Governor believes that other considerations should enter into its [Industrial Incentive Board's] deliberations and recommendations". Vitex Manufacturing Co. v. Government of the Virgin Islands, 3 Cir., 351 F.2d 313 (1965).

The Court, therefore, shall remand the case to the Industrial Incentive Board to make such recommendations as it may deem proper. The Industrial Incentive Board shall make such recommendations to the Governor of the Virgin Islands within 30 days from the date of this memorandum opinion. The Governor of the Virgin Islands shall act within a reasonable time upon the recommendations of the Industrial Incentive Board. If no action is taken by the Industrial Incentive Board or the Governor within the time prescribed above, the plaintiff shall have the right to reopen these proceedings and seek an order compelling the defendants to grant the tax exemption and subsidy benefits to plaintiff.

Having made the above determinations, the Court is of the opinion that it is not necessary to issue a preliminary injunction. Therefore, plaintiff's motion for a preliminary injunction is denied.

APPENDIX E

District Court's Second Opinion

VIRGO CORPORATION, a Virgin Islands Corporation, *Plaintiff*,

v.

RALPH M. PAIEWONSKY, Governor of the Virgin Islands, MORRIS F. DECASTRO, Director of the Budget of the Virgin Islands, and GOVERNMENT OF THE VIRGIN ISLANDS, *Defendatns.*

Civ. No. 37-1966.

District Court, Virgin Islands,
D. St. Croix.

June 2, 1966.

As Amended June 9, 1966.

Russell B. Johnson, Christiansted, St. Croix, V. I., Howrey, Simon, Baker & Murchison, William Simon, Washington, D. C., of counsel, for plaintiff, Virgo Corp.

Francisco Corneiro, Atty. Gen. of Virgin Islands, Charlotte Amalie, V. I., for defendant Ralph M. Paiewonsky.

WALTER A. GORDON, District Judge.

The plaintiff has brought a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for a Summary Judgment in its favor for the relief requested in its Complaint. Plaintiff in its Complaint seeks a declaratory judgment that §§ 511 to 518, Chapter 9, Title 33 of the Virgin Islands Code as amended by Act No. 1631 be declared null and void. Plaintiff in its Complaint further seeks a permanent injunction prohibiting the defendant, Virgin Islands Government's employees from enforcing any statute directly or indirectly levying a tax on watches shipped from the Virgin Islands to the United States.

I

The history, in brief, leading to this action is that the plaintiff and defendants herein were similarly plaintiff and defendants in this Court's Case No. 165-1965, 251 F.Supp. 279, testing §§ 511 to 518, Chapter 9, Title 33 of the Virgin Islands Code as created by Bill No. 2638—Sixth Legislature of the Virgin Islands (Exhibit A herein).

On March 14, 1966 this Court issued its Memorandum Decision in said Case No. 165-1965. On March 16, 1966 this Court issued an order granting to plaintiff in that case a Summary Judgment invalidating said law.

On March 16, 1966 in Special Session, the Virgin Islands Legislature passed Act No. 1631 (Exhibit E herein) entitled An Act to Amend Certain Provisions of Chapter 9, Title 33 of the Virgin Islands Code Relating to Production Taxes on Watches Manufactured in the Virgin Islands.

On March 22, 1966 that Act was approved by the Governor of the Virgin Islands.

That Bill amended in particular § 511 (a) and (b); § 513, § 514(a), (b), (d) (1) and (3) and § 515.

Pursuant to said Act the plaintiff herein was sent a letter dated April 19, 1966 from the Director of the Budget of the Virgin Islands setting forth a list of preliminary regular quotas for April 1, 1966 to March 31, 1967 which list included plaintiff's preliminary regular quota.

On March 29, 1966 plaintiff filed its Complaint in this action. On May 3, 1966 defendants filed their Answer.

On May 9, 1966 plaintiff brought on this motion for Summary Judgment based upon its verified Complaint and attached affidavits. Defendants have filed no opposing affidavits nor documents of any kind.

II

It appears from the record herein that there does not exist material issues of fact in this case and the Court therefore will decide this case pursuant to Rule 56 of the Federal Rules of Civil Procedure.

III

Plaintiff in its Complaint (page 5 paragraph 14) alleges as follows: "The invalidity of Sections 511 to 518, Chapter 9, Title 33 of the Virgin Islands Code, as amended, has been determined by this Court and its Judgment, Exhibit D, is *res adjudicata.*" In connection therewith plaintiff in its Complaint also alleges (page 5, paragraph 15): "Sections 511 to 518, Chapter 9, Title 33 of the Virgin Islands Code, as amended, are null and void because they: (a) Contravene the provisions of (i) the Revised Organic Act of the Virgin Islands (48 U.S.C.A. § 1406i) which provides that 'no new export duties shall be levied in the Virgin Islands except by Congress' * * * "

Defendants raise by oral argument that the Act as amended is a tax upon manufacturing on its face and not a tax upon exports and therefore is valid. Defendants assert that a State can tax manufacturing within its borders and defendants cite Port Construction Co. v. The Government of the Virgin Islands, D.C., 237 F.Supp. 486. Defendants' position is that the wording of the amended § 511(a) imposes a tax upon watches, clocks and timing apparatus manufactured in the Virgin Islands when sold or removed for sale, consumption or use and defendants therefore contend that this amendment creates a new tax and that that tax is by the wording of the new Act and upon its face a tax upon manufacturing and that the Court should accept it as such. Defendants assert that the plaintiff is not engaged in manufacturing and selling watches in interstate and foreign commerce. Based upon the affidavits and documents on file that assertion is not founded.

IV

The following for comparison are the §§ 511 to 518 of Chapter 9, Title 33 which the Court determined invalid by its order of March 16, 1966 and Act No. 1631 containing the amended sections in issue:

"ACT 1518

Sec. 511(a). There shall be imposed upon watches manufactured in the Virgin Islands, when sold or removed for sale, consumption or use, a tax at the rate of $2.50 per watch.

(b). A credit of $2.47 per watch shall be allowed upon:

(1) watches manufactured and sold for disposition in the course of retail trade in the Virgin Islands;

(2) watches manufactured and exported to other than the Customs area of the United States;

(3) watches manufactured pursuant to a quota allocated to such manufacture in accordance with the provisions of sections 512 or 513 of this chapter.

(c). For the purpose of sections 511 through 518 of this chapter, 'Watches manufactured in the Virgin Islands' includes not only all watches resulting from the processing of raw materials or other component parts, whether by hand or machinery or both, but also all watches mechanical or otherwise, or assembly of watch movements with respect to which substantial industrial operations are undertaken in the Virgin Islands which, in the judgment of the Governor of the Virgin Islands, affect the economic stability and the commercial relations of the Virgin Islands.

(d). The manufacturer liable for the payment of tax hereunder shall in each case submit such proof as may be required by the Governor as is satisfactory to establish the rate or rates of tax applicable under subsections (a) and (b) of this section to the watch production of such manufacturer.

(e). It shall be obligatory that the tax imposed by subsection (a) of this section be paid periodically, either by the manufacturer, an immediate or secondary purchaser from the manufacturer, or a contract or common carrier, at such intervals and in accordance with such rules and regulations as shall be adopted pursuant to this title by the Governor.

Sec. 512. An amount of 1,800,000 units of watches is hereby established as the maximum amount of watch production consistent with the protection of the economic stability and commercial relations of the Virgin Islands for the period October 1, 1965, to March 31, 1966. Of this amount, the Governor is authorized to allocate 1,500,000 units among manufacturers of watches having a continuous watch manufacturing and shipping record in the Virgin Islands since October 1, 1964, in accordance with the procedure and criteria set forth in section 514 of this chapter. The remaining 300,000 units of watches is reserved as a quantity to be granted in order to relieve against severe financial hardship, and to permit allocation to new manufacturers. All units of watches allocated as quotas to manufacturers under this section shall be entitled to a $2.47 credit per watch.

Sec. 513(a). For each 12-month period subsequent to March 31, 1966, the Governor shall determine, after due investigation, the total annual consumption of watches of all kinds in the customs area of the United States and shall allocate among the manufacturers of watches in the Virgin Islands on that date in accordance with the criteria set forth in section 514(b) such number of units as shall total 1/9 of annual consumption.

(b). Of the maximum amount of watch production determined in accordance with subsection (a) of this section, not to exceed five per cent shall be reserved as a quantity to supplement quotas allocated to manufacturers and to relieve against severe financial hardship, in accordance with the provisions of section 515 of this chap-

ter. The Governor is authorized to allocate the remainder among manufacturers of watches in the Virgin Islands in accordance with the procedure and criteria set forth in section 514 of this chapter. All units of watches allocated as quotas to manufacturers under this section shall be entitled to $2.47 credit per watch.

Sec. 514(a). Each person engaged or proposing to engage in the manufacture of watches in the Virgin Islands may apply to the Governor for an allocation of the amount of watch production entitled to the $2.47 credit. Such application shall be in writing, shall be on such forms, and shall contain such information, duly certified by independent accountants or auditors as may be required by the Governor in accordance with the provisions of sections 511 to 518 of this chapter or regulations thereunder.

(b). Except as to such portions thereof as shall have been set aside as a reserve, the total maximum amount of watch production entitled to the $2.47 credit per watch shall be allocated for specific periods among applicants in accordance with the following criteria:

(1) 66⅔ per cent of such amount shall be apportioned among manufacturers in accordance with their respective percentages of total payroll in the Virgin Islands subject to Social Security taxation (exclusive of managerial or administrative personnel) incurred in watch manufacture; for disposition in the course of retail trade in the Virgin Islands; for export to other than the Customs area of the United States; and for watches manufactured pursuant to a quota allocation in accordance with Sections 512 or 513 of this chapter; for such six month period nearest to the beginning of the period involved as the Governor may determine to be feasible.

(2) 33⅓ percent of said amount shall be apportioned among manufacturers in proportion to the total number of watches:

manufactured and sold for disposition in the course of retail trade in the Virgin Islands;

exported to other than the Customs area of the United States; and manufactured and shipped under quota allocation to the Customs area of the United States;

during the same six month period as provided for in (1) above.

(c). The Governor shall have the authority to grant an application on temporary basis during such period as may be necessary to conduct and make determinations in accordance with investigations pursuant to section 513(a) or to make final disposition of application.

(d). The Governor may upon due notice and hearing, refuse an application for an allocation or may revoke, modify or suspend an apportionment made to a manufacturer hereunder as in his judgment may be necessary to protect the economic stability and the commercial relations of the Virgin Islands upon a finding that

(1) the manufacturer is not in good faith organized for the purpose of the manufacture of watches in the Virgin Islands; or

(2) the application is or was made for the purpose of frustrating or defeating the purposes of this Chapter in protecting the economic stability and commercial relations of the Virgin Islands; or

(3) the manufacturer has discontinued the manufacture of watches in the Virgin Islands; except that (i) a temporary interruption of production attributable to normal business reasons shall not be deemed in itself a discontinuance of manufacture of watches within the meaning of this subparagraph, and (ii) nothing in this subparagraph shall prohibit the sale of a business to which a quota has been assigned, but no

quota may be purchased or sold apart from the sale of the business;

(4) the manufacturer has misrepresented material facts in connection with his application, or has failed or refused to submit information as required; or

(5) the manufacturer has failed to utilize wholly or partially, the quota assigned to him.

(e). In the apportionment of quotas to a manufacturer hereunder, the Governor is authorized to take into account, and to make a corresponding deduction, watch for watch, where such is in his judgment necessary to protect the economic stability and the commercial relations of the Virgin Islands, of any quantity of watches shipped to the customs area of the United States by the same manufacturer, or a firm corporately or personally affiliated, from any other territory or possession of the United States.

(f). Whenever the Governor shall determine upon due notice and hearing, that all or part of a quota allocated to a manufacturer shall remain unused at the end of a quota period, he may cancel the allocation, in whole or in part, as the case may be, and such allocation, in whole or in part may be reallocated to another manufacturer or placed in the reserves provided for in section 512 or 513(b) of this chapter.

Sec. 515. In making grants out of the reserve amount provided for in sections 512, and 513(b) of this chapter, the Governor shall give special weight to the maintenance and promotion of employment, and to the complete assembly of watches from individual component parts and other characteristics of production contributing special value to the Virgin Islands. The Governor shall also take into account, but is not limited to the consideration of the following factors: investment in plant and equipment for watchmaking in the Virgin Islands; minimum

quantities required for production without loss, and abnormal or unforeseeable economic circumstances.

Sec. 516. The Governor is authorized to designate such individuals or groups from time to time as he may deem necessary for the purpose of assisting or advising him in the performance of his duties and responsibilities, and the exercise of his authority under the provisions of sections 511 to 518 of this chapter.

Sec. 517. The Governor shall have authority to issue such rules, regulations and requirements as he may deem necessary or appropriate to effectuate and implement the provisions of sections 511 to 517 of this chapter, including but not limited to the prescribing of forms and requirements of reports and the issuance of stamps or other evidence of payment of taxes.

Sec. 518. Any decision or determination made by the Governor under the provisions of this chapter as to questions of fact shall be deemed final in any proceedings in any court except upon a conclusive showing that such decision or determination was arbitrary or fraudulent. The commencement of any proceedings in any court shall not operate as a stay of collection of any tax imposed by this chapter, or of compliance with any provisions of the same or any rules, regulations or orders issued thereunder.

SECTION 2. This Act shall become effective upon approval by the Governor.

Thus passed by the Legislature of the Virgin Islands on August 25, 1965.

Witness our Hands and the Seal of the Legislature of the Virgin Islands this 25th Day of August, A. D., 1965."

/s/ EARLE B. OTTLEY
President

/s/ DAVID PURITZ
Legislative Secretary

"ACT 1631

BILL NO. 2780

To Amend Certain Provisions of Chapter 9, Title 33 of the Virgin Islands Code Relating to Production Taxes on Watches Manufactured in the Virgin Islands.

BE IT ENACTED by the Legislature of the Virgin Islands:

Section 1. Subsection (a), section 511 of Title 33 of the Virgin Islands Code is hereby amended to read as follows:

§ 511. (a) There shall be imposed upon watches, clocks and timing apparatus manufactured in the Virgin Islands, when sold, or removed for sale, consumption or use, a tax at the rate of $2.50 per watch.

Section 2. Subsection (b), section 511 of said Title 33 is amended to read:

(b). For the purpose of sections 511 through 518 of this chapter, 'Watches, clocks and timing apparatus manufactured in the Virgin Islands' includes not only all watches, clocks and timing apparatus resulting from the processing of raw materials or other component parts, whether by hand or machinery or both, but also all watches, clocks and timing apparatus, mechanical or otherwise, or assembly of watch or clock movements or timing apparatus with respect to which substantial industrial operations are undertaken in the Virgin Islands which, in the judgment of the Governor of the Virgin Islands, affect the economic stability and the commercial relations of the Virgin Islands.

Section 3. Subsection 513 of said Title 33 is amended to read as follows:

(a) For each 12-month period subsequent to March 31, 1966, the Governor shall determine, after due investigation, the total annual consumption of watches of all kinds within the customs area of the United States during the

latest calendar year and shall allocate among manufacturers of watches in the Virgin Islands during each 12-month period subsequent to March 31, 1966, in accordance with the criteria set forth in section 514(b) of this Title, such number of units as shall total 1/9 of such annual consumption. In the event that total annual consumption of watches of all kinds within the customs area of the United States during the latest calendar year cannot be determined as of April 1 of the year following, the Governor is authorized to make preliminary and partial allocations on that date, which allocations shall be taken into account when consumption data for such latest calendar year become available. If the annual consumption total for the latest calendar year is revised by the United States Tariff Commission during any such 12-month period, the Governor is authorized to make appropriate and corresponding adjustment of the allocations made to Virgin Islands manufacturers.

(b) If in any 12-month period subsequent to March 31, 1966, clocks, or timing apparatus other than watches are produced in the Virgin Islands, the Governor shall determine, after due investigation, the total annual consumption of clocks and the total annual consumption of the same or similar timing apparatus in the customs area of the United States and shall allocate among 1) Virgin Islands manufacturers of clocks and/or 2) Virgin Islands manufacturers of timing apparatus other than watches, such number of units as shall total 1/9 of such annual consumption of clocks and such number of units as shall total 1/9 of such timing apparatus other than watches. Such allocations shall be in accordance with provisions established herein with respect to watches. In the event that a manufacturer produces more than one category of products for which allocation is to be made, his allocation for each category of product shall be separately determined and an apportionment of his payroll reported under sec-

tion 514 (b) (1) of this Title shall be required to be made, in accordance with such rules and regulations as shall be adopted by the Governor.

(c) Of the maximum amount of production of watches, clocks or timing apparatus determined in accordance with subsections (a) and (b) of this section not to exceed five per cent in each category shall be reserved as a quantity to supplement quotas allocated to manufacturers and to relieve against severe financial hardship, in accordance with the provisions of section 515 of this chapter. The Governor is authorized to allocate the remainder among manufacturers in the Virgin Islands of watches, clocks or timing apparatus in accordance with the criteria set forth in section 514 of this chapter. In the event that a manufacturer produces more than one category of products for which an allocation is to be made, his allocation for each category of product shall be separately determined and an apportionment of his payroll reported under section 514(b) (1) of this chapter shall be required to be made in accordance with such rules and regulations as shall be adopted by the Governor.

Section 4. Subsections (a) and (b) of section 514 of said Title 33 are amended to read as follows:

§ 514(a) Each person engaged or proposing to engage in the manufacture of watches, clocks or timing apparatus in the Virgin Islands may apply to the Governor for an allocation of the amount of production for each such category entitled to the $2.47 credit. Such application shall be in writing, shall be on such forms, and shall contain such information, duly certified by independent accountants or auditors as may be required by the Governor in accordance with the provisions of sections 511 to 518 of this chapter or regulations thereunder.

(b) Except as to such portions thereof as shall have been set aside as a reserve, the total maximum amount

of watch, clock or timing apparatus production entitled to the $2.47 credit per watch shall be allocated for specific periods among applicants in accordance with the following criteria:

(1) 66⅔ per cent of such amount shall be apportioned among manufacturers in accordance with their respective percentages of total payroll in the Virgin Islands subject to Social Security taxation (exclusive of managerial or administrative personnel) incurred in manufacture of watches, clocks, or timing apparatus; for disposition in the course of retail trade in the Virgin Islands; for export to other than the Customs area of the United States; and for watches, clocks or timing apparatus manufactured pursuant to a quota allocation in accordance with sections 512 or 513 of this chapter; for such six-month period nearest to the beginning of the period involved as the Governor may determine to be feasible.

(2) 33⅓ per cent of said amount shall be apportioned among manufacturers in proportion to the total number of watches, clocks or units of timing apparatus; manufactured and sold for disposition in the course of retail trade in the Virgin Islands; exported to other than the Customs area of the United States; and manufactured and shipped under quota allocation to the Customs area of the United States; during the same six-month period as provided for in (1) above.

Section 5. Subparagraphs (1) and (3) of subsection (d), section 514 of said Title 33 are amended to read as follows:

(1) the manufacturer is not in good faith organized for the purpose of the manufacture of watches, clocks or timing apparatus in the Virgin Islands; or

(3) the manufacturer has discontinued the manufacture of watches, clocks or timing apparatus in the Virgin Is-

lands; except that (i) a temporary interruption of production attributable to normal business reasons shall not be deemed in itself a discontinuance of manufacture within the meaning of this subparagraph, and (ii) nothing in this section shall prohibit the sale of a business to which a quota has been assigned, but no quota may be purchased or sold apart from the sale of the business.

Section 6. Subsection (e), section 514 of said Title 33 is amended to read as follows:

(e) In the apportionment of quotas to a manufacturer hereunder, the Governor is authorized to take into account, and to make a corresponding deduction, unit for unit of the category of product, where such is in his judgment necessary to protect the economic stability and the commercial relations of the Virgin Islands, of any quantity of watches, clocks or units of timing apparatus shipped to the customs area of the United States from any other territory or possession of the United States by the same manufacturer, or by subsidiary wholly or partially owned by it, a corporation with substantially the same stockholders or officers, or any non-corporate business organization a substantial financial interest in which is held by such manufacturer, or by its officers or stockholders.

Section 7. Section 515 of said Title 33 is amended by deleting from the last sentence thereof the words 'for watchmaking'.

Section 8. This Act shall become effective upon approval by the Governor.

February 16, 1966''

V

In comparing the two it will be noted that in both Acts, § 511(a) imposes a tax of $2.50 each upon watches manufactured in the Virgin Islands when sold or removed for

sale, consumption or use (clocks and timing apparatus also have been included throughout by Act No. 1631).

The credit in § 511(b) of the previous Act of $2.47 per watch if sold retail in the Virgin Islands, shipped to other than the United States Customs area or manufactured per the quota established was eliminated in the Act in issue and was replaced by § 511(d) which provided that the rate of tax imposed shall be 3¢ per watch, clock or timing apparatus *upon the amount of production* (italics supplied) for each said unit produced within the quota established by the Governor and $2.50 per each said unit in excess.

Section 513(a) as newly amended provides *as did its predecessor* that the *total quota* to be allocated shall equal 1/9 of the total watches *consumed within the Customs Area of the United States* (§ 513(b) of the new Act provides similarly for clocks and timing apparatus).

VI

[1] It is clearly held by the United States Supreme Court in the following cases that the Court in determining the validity of a tax statute shall concern itself with the practical operation of the tax, that is, substance rather than form. American Oil Company v. Neill, 380 U.S. 451, 455, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965). "In resolving the issue, [this Court is] not concluded by the name or description of the tax as found in the act; [this Court's] duty is to ascertain its nature and effect". Stewart Dry Goods Company v. Lewis, 294 U.S. 550-580, 55 S.Ct. 525, 527, 79 L.Ed. 1054.

[2] As stated by the United States Supreme Court in Galveston, Harrisburg and San Antonio Railway Co. et al. v. State of Texas, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031 "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its

nature and effect." See also Postal Telegraph Cable Co. v. Adams, Revenue Agent of the State of Mississippi, 155 U.S. 688, 698, 15 S.Ct. 268, 39 L.Ed. 311, 316.

Act No. 1631 states at one point that it taxes production of units (§ 511(d) and at another point that it taxes the sale or removal for sale of said items (§ 511(a)).

The Act as amended does not levy a flat tax upon all production nor does it levy a graduating tax upon all production. It does however (as did its predecessor Act) create a quota effecting the tax rate. This quota is geared to *previous annual consumption of watches in the customs area of the United States.* This quota foundation is identical to the quota foundation of the predecessor Act.

Act No. 1631 imposes (as did Act No. 1518) a tax of 3¢ per unit on items within the quota allocation and $2.50 per unit on those items in excess of the quota or to be sold outside of the United States Customs area. This wide tax rate gap is suggestive of a regulatory rather than a revenue raising measure based upon production.

Whatever differences that do exist in the wording of the two Acts either accomplish the same results or are insignificant.

The legislative history of this amended act shows its passage by the Legislature on March 16, 1966 the very same day that this Court declared the original §§ 511 to 518 of Chapter 9, Title 33 to be invalid. The amended Act was approved by the Governor on March 22, 1966.

In 1965 total watch production in the U. S. Virgin Islands approximated 3,671,906 units of which 3,578,000 units were shipped to the United States—in other words approximately 97.4% of the Virgin Islands watch production was shipped to the United States for sale. Therefore, a tax upon watch production in the Virgin Islands or upon watches sold or removed for sale in reality taxes watches exported to the United States Customs area.

VII

The United States Supreme Court has said: "If by varying the form—that is to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject where another is in reality aimed at—the substance and effect of the imposition may be changed, constitutional limitations upon powers of taxation would come to naught. The rule is otherwise". * * * "The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld without subverting the well-established rule that '* * * what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result * * *' Fairbanks v. United States, 181 U.S. 283, 294, 300 L.Ed. 862, 869, 21 S.Ct.Rep. 648". Macallen Company v. Commonwealth of Massachusetts, 279 U.S. 620, 49 S.Ct. 432, 73 L.Ed. 874 (1929).

[3] Act No. 1631 although somewhat different in language than Act No. 1518 nevertheless has the same effect. The result accomplished is the same result accomplished by Act 1518. This Court therefore must find §§ 511 to 518, Chapter 9, Title 33 of the Virgin Islands Code as amended by Act No. 1631 as invalid as it found said sections created by Act No. 1518 and therefore declare §§ 511 to 518, Chapter 9, Title 33 of the Virgin Islands Code as amended by Act No. 1631 null and void for the reason it is an export duty upon watches entering the Customs area of the United States and by reason thereof said amended Act is in contravention of § 36 of the Organic Act of the Virgin Islands of the United States (June 22, 1936, ch. 699, 49 Stat. 1816, 48 U.S.C. § 1406i).

For United States Supreme Court cases in point on this subject see:

Stewart Dry Goods Company v. Lewis, 294 U.S. 550-580, 55 S.Ct. 525, 79 L.Ed. 1054 (1935); Dawson, Attorney General of Kentucky et al. v. Kentucky Distilleries and Warehouse Company, 255 U.S. 288, 41 S.Ct. 272, 65 L.Ed. 638; St. Louis Cotton Compress Co. v. State of Arkansas, 260 U.S. 346, 43 S.Ct. 125, 126, 67 L.Ed. 297; Cook v. Pennsylvania, 97 U.S. 566, 24 L.Ed. 1015; Crew Levick Co. v. Commonwealth of Pennsylvania, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295; Galveston, Harrisburg and San Antonio Railway Co. et al. v. State of Texas, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031.

This case having been decided on the above grounds, the additional grounds alleged by the plaintiff need not be determined. For the above reasons cited, the motion of the plaintiff for Summary Judgment upon its Complaint seeking a Declaratory Judgment pursuant to 28 U.S.C. §§ 2201-2202 and §§ 1261-1272, Chapter 89, Title 5 of the Virgin Islands Code, that §§ 511 to 518, Chapter 9, Title 33 of the Virgin Islands Code as amended by Act No. 1631 are invalid, null and void is hereby granted.

This Court has considered Plaintiff's request for injunctive relief and in view of this Court's decision above declaring the amended Act invalid, the Court deems that said injunctive relief is not necessary and Plaintiff's request for said relief is therefore denied.

APPENDIX F

District Court's Third Opinion

VIRGO CORPORATION, a Virgin Islands Corporation,
Plaintiff,

v.

RALPH M. PAIEWONSKY, Governor of the Virgin Islands, et al., *Defendant*.

Civ. No. 165-1965.

District Court, Virgin Islands

D. St. Croix.

Oct. 10, 1966.

Russell B. Johnson, Christiansted, St. Croix, V. I., for plaintiff.

William Simon and J. Coleman Bean, of Howrey, Simon, Baker & Murchison, Washington, D. C., of counsel, for plaintiff.

Francisco Corneiro, Atty. Gen., of the Virgin Islands, for defendants.

MEMORANDUM OPINION

WALTER A. GORDON, District Judge.

Plaintiff has made application to defendants under Title 33 Virgin Islands Code Chapter 201 for certain tax benefits in connection with the operation of their business in the Virgin Islands. By previous order of this Court the Industrial Incentive Board was ordered to act upon plaintiff's application within fifteen days and the Governor to make his determination within a reasonable period of time thereafter.

The Industrial Incentive Board did act and the Governor did make his determination, the results of which were forwarded to plaintiff from the Governor by his letter to

plaintiff dated September 16, 1966. The letter reads as follows:

> "September 16, 1966: Everett Birch, Esquire, President, Virgo Corporation, P. O. Box 1239, St. Thomas, Virgin Islands, Dear Mr. Birch: Section 4001, Title of the Virgin Islands Code provides that it is the policy of the Government of the Virgin Islands that tax exemption and subsidy benefits be made available for the promotion of such industrial or business activities as may be determined will promote the public interest by economic development of the Virgin Islands, and the establishment or expansion of which require the stimulus of such governmental assistance. By letter of July 11, 1966 the Virgin Islands Industrial Incentive Board has recommended to me the granting of nontaxable subsidy, equal to 90 per cent of the amount (without deduction of administrative costs of collection) of import duties paid into the Treasury of the Virgin Islands by Virgo Corporation on raw materials brought into the Virgin Islands by the said corporation in connection with its business activities in the manufacturing of watches.
>
> After due deliberation, I hereby disapprove the recommendation of the Board and the application for benefit is, accordingly, denied, for the reason that the corporation, as evidenced by its substantial profit return, does not require the stimulus of governmental assistance as provided for by the law. Sincerely, Ralph M. Paiewonsky, Governor".

Plaintiff has brought a motion for an order to reopen the proceedings and to compel the defendants to grant plaintiff the tax benefits it has applied for.

I

The Governor has set forth his denial stating as the sole reason "as evidenced by its substantial profit return

that (plaintiff) does not require the stimulus of governmental assistance as provided by law".

Title 33 Virgin Islands Code Chapter 201, Subchapter I, Declaration of Policy, Section 4001(a), provides:

> "(a) The objective of the provisions of this subtitle is to promote the economic development of the Virgin Islands by the offering of certain incentives to the establishment or expansion of industries or businesses. To this end it is the policy of the Government of the Virgin Islands that tax exemption and subsidy benefits be made available for the promotion of such industrial or business activities as may be determined will promote the public interest by economic development of the Virgin Islands, and the establishment or expansion of which require the stimulus of such governmental assistance. Accordingly, it is hereby declared that in the interests of the public welfare exemptions from payment of certain taxes or fees and the granting of certain subsidies be allowed to beneficiaries qualifying in accordance with the provisions hereof."

Title 33, Virgin Islands Code Chapter 201, Subchapter II, Qualifying Beneficiaries, Section 4041, provides in part:

> "A person, firm, or corporation, engaged in or about to engage in an industrial or business activity in the Virgin Islands, which industrial or business activity, in the judgment of the Governor of the Virgin Islands will promote the public interest by economic development of the Virgin Islands, may apply for the same, if such person, firm, or corporation meets the following requirements:"

It should be noted that subchapter I, Section 4001, sets forth the legislative policy with respect to the granting of tax benefits. The second sentence therein clearly shows a mandatory intention on behalf of the Legislature for the granting of the benefits when it says " * * * that tax

exemption and subsidy benefits *be made* available * * * " (underscoring provided). The sentence continues and shows legislative intention to allow discretion as to who shall receive such benefits when it says "as may be determined will promote the public interest by economic development of the Virgin Islands, and * * * ". It is important to note that at this point the remainder of the sentence is separated by a comma. The discretionary guide line ends with the comma and a separate element of legislative intent with respect to the basis that the benefits be made available is then set forth. That separate element is to make the tax benefits available to companies that require the tax benefits to stimulate their establishment or expansion in the Virgin Islands. This later element is not prefaced by the discretionary phrase "as may be determined" nor any equivalent. While it is reasonable to interpret that the Legislature intended that the Virgin Islands Government could determine what would promote the public interest by economic development of the Virgin Islands it would be a more reasonable interpretation that the Legislature intended that the prospective business would determine if it would be stimulated to establish in the Virgin Islands because of the tax benefits rather than that some one else would determine if the business would or would not be so stimulated.

[1] This interpretation of Section 4001 is affirmed by the more pertinent Section 4041. It is Section 4041 that actually sets forth the requirements. Subchapter I merely dealt with policy. Subchapter II makes the provisions for qualification (more particularly Section 4041 therein). In the introductory paragraph of the requirements section (Sec. 4041) the Legislature restates the discretionary element previously referred to in Section 4001. It places the discretion with the Governor. However, it is to be noted that in restating the discretion to be used, the Legislature has limited the discretion, to that which the Governor determines will promote the public interest by eco-

nomic development of the Virgin Islands. The Legislature did not repeat in the requirements section the element "* * * and the establishment or expansion of which require the stimulus of such governmental assistance". It therefore is quite clear that the Legislature intended the Governor to use his discretion only to determine if the business will promote the public interest by economic development of the Virgin Islands.

[2] The Governor's decision was infected by an error of law and for that reason said decision is ordered set aside.

II

[3] Plaintiff requests the Court to direct the defendants to grant plaintiff the benefits applied for. That, this Court cannot do. This Court's power to review under Chapter 201 was specifically set forth by the Third Circuit Court of Appeals when it said:

> "We conclude that the district court exceeded its power when it ordered the Government to grant to the Corporation the tax exemption and subsidy benefits which the Governor had denied it. But all this is not to say that the court was without power to review the action of the Board and the Governor in order to determine whether any error of law infected their proceedings or decision and to set aside the Governor's decision if such error was found and remand the case for further proceedings in accordance with the applicable rules of law properly applied. §§ 1421 et seq. of Title 5 V.I.C. give the court this power." King Christian Enterprises, Inc. v. Government of Virgin Islands, 345 F.2d 633.

For the above reasons the application is remanded to the Governor for further proceedings in accordance with the applicable rules of law properly applied and consistent with this Court's decision.

APPENDIX G

Legislative Material Relating to the Revision of the Organic Act of the Virgin Islands

I

H. R. REPORT No. 1726

85th Congress, 2d Session

AMENDING THE REVISED ORGANIC ACT OF THE VIRGIN ISLANDS

May 19, 1958—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. O'BRIEN of New York, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 12303]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 12303) to amend the Revised Organic Act of the Virgin Islands, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

The purpose of H. R. 12303, introduced by Representative Aspinall, is to amend the Revised Organic Act of the Virgin Islands (68 Stat. 497) in 10 respects in order to remove ambiguities and technical imperfections which now exist in the statute.

* * * * * *

SECTIONAL ANALYSIS

* * * * * *

Section 2 amends section 8(a) of the existing law under which Territorial legislature's power extends "to all subjects of local application." The amendment would make

this read: "to all rightful subjects of legislation." In *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1 (1955), the Supreme Court held that, at least with respect to persons who are not permanent residents of the islands, the phrase "subjects of local application" has a meaning narrower than the phrase "rightful subjects of legislation." The latter language is used in the Organic Acts of Alaska and Hawaii.

* * * * * *

Section 10 adds a new section to the Revised Organic Act, which will expressly repeal the Organic Act of June 22, 1936. The failure of the 1954 act to repeal expressly the earlier act has created confusion as to its status. The repeal will apply in particular to section 36 of the 1936 act and will thus remove (1) the present bar against enactment by the Territorial legislature of laws concerning import duties and customs and (2) the jurisdiction of the Treasury Department over customs of the Virgin Islands. The Territorial legislature will be free, if it wishes to do so, to repeal the 6-percent duty on foreign goods imported into the Virgin Islands.

* * * * * *

REPORTS SUBMITTED

Reports were received from several departments interested in H. R. 12303 and are included as follows:

* * * * * *

UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT,
Philadelphia, Pa., March 14, 1957.

Hon. CLAIR ENGLE,

Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D. C.

DEAR CONGRESSMAN: May I submit the following comments with respect to H. R. 2127 to amend the Revised Organic Act of the Virgin Islands.

Section 1 of the bill would amend the last sentence of section 24 of the Revised Organic Act which now reads: "The Attorney General shall, as heretofore, appoint a marshal *and one deputy marshal* for the Virgin Islands to whose office the provisions of chapter 33 of title 28, United States Code, shall apply." The italicized phrase "and one deputy marshal" was inserted by amendment during the passage of the bill. The effect of its insertion in the sentence was inadvertently to render ungrammatical and ambiguous the last part of the sentence, which was intended to provide that chapter 33 should apply to the office of the marshal. The deputy marshal, being merely a subordinate in that office, of course does not have a separate independent office, but the sentence now reads as though it is to his office that chapter 33 is to apply. Section 1 of the bill corrects this error by eliminating the unnecessary reference to the deputy marshal, whose appointment is sufficiently authorized by section 542 of chapter 33 of title 28, United States Code.

Section 2 of the bill corrects another inadvertent error in the Revised Organic Act which appears in section 27. This section provides for the office of United States attorney for the Virgin Islands. This official was formerly called the district attorney. In changing the title of the office to United States attorney in section 27 the conference report inadvertently failed to make the change in the seventh and eighth sentences of the section. The result is that the title "district attorney" still appears in those two sentences and those alone. Section 2 of the bill corrects this error by substituting "United States attorney" for "district attorney" wherever the latter appears in those two sentences.

Section 3 of the bill corrects an ambiguity appearing in section 26 of the Revised Organic Act which was carried forward without correction from the Organic Act of 1936. It appears in the first sentence of section 26 which is as follows: "In any criminal case originating in the district court, no person shall be denied the right to trial by jury *on the demand of either party.*" The italicized phrase in

this sentence "on the demand of either party" is extremely ambiguous and confusing. It is clear that the legislative intention was that a defendant in a criminal case in the district court should not be denied the right to a jury trial if he demands it. It is meaningless, however, to provide, as the present language in effect does, that no person shall be denied the right to trial by jury if the other party, the government, demands it. For in such a case the defendant not having himself demanded a jury trial must be assumed not to desire it and, therefore, his failure to receive it would not be a denial of a right even though the government demanded a jury trial. Section 3 of the bill removes all ambiguity in this language by making it explicit that a jury trial shall be had if demanded by either the defendant or the government.

Section 4(a) of the bill would add a new section 37 to the Revised Organic Act expressly repealing the former Organic Act of 1936. The failure of the Revised Organic Act to repeal its predecessor of 1936 was an inadvertence which has caused confusion as to the present status of the organic law of the Territory. This section would rectify this error with an appropriate interim proviso with respect to section 36 of the old act.

Section 4(b) of the bill would correct another inadvertent error in the Revised Organic Act, i.e., the omission from it of the provision of the 1936 act prohibiting the imposition of a political or religious test as to qualification for holding office under the government of the Virgin Islands. This provision should obviously be reinstated.

I believe that all of the amendments proposed by H. R. 2127 are necessary to correct obvious error and I hope that the bill may be enacted promptly.

Sincerely yours,

ALBERT B. MARIS.

The Committee on Interior and Insular Affairs recommends the enactment of H. R. 12303.

II

SENATE REPORT NO. 2267, AUGUST 8, 1958

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 12303) to amend the Revised Organic Act of the Virgin Islands, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The purpose of H. R. 12303, as amended, is to amend the Revised Organic Act of the Virgin Islands (68 Stat. 497) in many respects in order to remove ambiguities and imperfections which now exist in the statute.

* * * * * *

Sectional Analysis

* * * * * *

Section 10 of the bill as it passed the House of Representatives was deleted by the committee. One of the main results of the former section would be the discontinuance of Federal control over the rates of customs duties on goods imported into the Virgin Islands. The section would also have terminated the authority of the Treasury Department to administer such customs. Such action would have resulted in an increase in the burden on the United States Treasury to support Treasury functions in the islands, such increase amounting to at least $42,000 per year. The section would likewise necessitate the reorganization of certain functions of other Federal agencies in the islands. For these reasons it was decided to strike out the section and reconsider the subject when the appropriate details have been worked out.

* * * * * *

The Committee on Interior and Insular Affairs recommends the enactment of H. R. 12303, as amended.

III

PUBLIC LAW 85-851; 72 STAT. 1094

[H. R. 12303]

An Act to amend the Revised Organic Act of the Virgin Islands.

Be it enacted by the Senate House of Representatives of the United States of America in Congress assembled, That:

Section 3 of the Revised Organic Act of the Virgin Islands [1] is amended by adding at the end thereof the following new paragraph:

"No political or religious test other than on oath to support the Constitution and the laws of the United States applicable to the Virgin Islands, and the laws of the Virgin Islands, shall be required as a qualification to any office or public trust under the Government of the Virgin Islands."

Sec. 2. Subsection (a) of section 8 of said Act [2] is amended to read as follows:

"(a) The legislative authority and power of the Virgin Islands shall extend to all rightful subjects of legislation not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States, nor shall the lands or other property of nonresidents be taxed at a higher rate than the lands or other property of residents."

Sec. 3. Subsection (e) of section 8 of said Act is amended by striking the words "and any supplements to it".

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[1] 48 U.S.C.A. § 1561.

[2] 48 U.S.C.A. § 1574.

Sec. 4. Subsection (a) of section 17 of said Act[3] is amended by striking the words "not to exceed".

Sec. 5. Subsections (e) and (f) of section 17 of said Act are amended to read as follows:

"(e) The decisions of the government comptroller shall be final except that appeal therefrom may, with the concurrence of the Governor, be taken by the party aggrieved or the head of the Department concerned, within one year from the date of the decision, to the Secretary of the Interior, which appeal shall be in writing and shall specifically set forth the particular action of the government comptroller to which exception is taken, with the reasons and the authorities relied upon for reversing such decision.

"(f) If the Secretary of the Interior confirms the decison of the government comptroller, or if the Governor does not concur in the taking of an appeal to the Secretary, then relief may be sought by suit in the District Court of the Virgin Islands if the claim is otherwise within its jurisdiction."

Sec. 6. (a) Subsection (c) of section 20 of said Act[4] is amended to read as follows:

"(c) The salaries of the Governor, the Government Secretary, the government comptroller, and the members of their immediate staffs shall be paid by the United States. The salaries of the heads of the executive departments shall be paid by the government of the Virgin Islands; and if the legislature shall fail to make an appropriation for such salaries, the salaries theretofore fixed shall be paid without the necessity of further appropriations therefor."

(b) This section 6 shall become effective on July 1, 1959.

Sec. 7. The last sentence of section 24 of said Act[5] is amended to read as follows: "The Attorney General shall

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[3] 48 U.S.C.A. § 1599.
[4] 48 U.S.C.A. § 1641.
[5] 48 U.S.C.A. § 1614.

appoint a United States marshal for the Virgin Islands, to whose office the provisions of chapter 33 of title 28, United States Code, shall apply."

Sec. 8. The first sentence of section 26 of said Act[6] is amended to read as follows: "All criminal cases originating in the district court shall be tried by jury upon demand by the defendant or by the Government."

Sec. 9. Wherever the term "district attorney" appears in the seventh and eighth sentences of section 27 of said Act[7] the following term shall be substituted: "United States attorney".

Sec. 10. The first sentence of subsection (b) of section 8 of said Act is amended to read as follows: "The legislature of the government of the Virgin Islands may cause to be issued on behalf of said government bonds or other obligations (1) for specific public improvement or specific public undertaking authorized by an act of the legislature, and (2) for the establishment, construction, operation, maintenance, reconstruction, improvement, or enlargement of other projects, authorized by an act of the legislature, which will, in the legislature's judgment, promote the public interest by economic development of the Virgin Islands. Such bonds or obligations shall be payable solely from the revenues directly derived from and attributable to such specific public improvement, public undertaking, or other project."

Sec. 11. As used in this Act, the term "Revised Organic Act of the Virgin Islands" means the Act of July 22, 1954 (68 Stat. 497), as amended (48 U.S.C., secs. 1541 et seq.).[8]

Approved August 28, 1958.

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[6] 48 U.S.C.A. § 1616.

[7] 48 U.S.C.A. § 1617.

[8] 48 U.S.C.A. § 1541 et seq.

APPENDIX H

Statutes Involved

I

The Watch Production Quota Act of 1965, and the Amended Watch Production Quota Act of 1966, 33 V.I.C. §§ 511-518, are reproduced in the District Court's second opinion at pp. 50a-60a, *supra*.

II

The Virgin Islands Industrial Incentive Program Act, 33 V.I.C. § 4001 *et seq.*, provides in pertinent part:

Subchapter I. Declaration of Policy

§ 4001. Objective contractual nature

(a) The objective of the provisions of this subtitle is to promote the economic development of the Virgin Islands by the offering of certain incentives to the establishment or expansion of industries or businesses. To this end it is the policy of the Government of the Virgin Islands that tax exemption and subsidy benefits be made available for the promotion of such industrial or business activities as may be determined will promote the public interest by economic development of the Virgin Islands, and the establishment or expansion of which require the stimulus of such governmental assistance. Accordingly, it is hereby declared that in the interests of the public welfare exemptions from payment of certain taxes or fees and the granting of certain subsidies be allowed to beneficiaries qualifying in accordance with the provisions hereof.

(b) In order to establish the incentive offered hereunder on a firm, realistic and sure basis, the Government of the Virgin Islands further declares that it considers each order granting tax exemption or subsidy that may be issued under the provisions of this subtitle as being in the nature of a contract between the said Government and the

beneficiary, and that the Government shall not adopt any legislation impairing or limiting the obligation of such contract or which may defeat the provisions of this subtitle.

(c) The Department of Commerce of the Virgin Islands shall promote the industrial incentive program provided for in this title and shall provide such informational or other related services as may be necessary to aid in effectuating its purposes. — Added Nov. 3, 1961, No. 798, § 2, Sess. L. 1961, p. 252.

Subchapter II. Qualifying Beneficiaries

§ 4041. Requirements generally

A person, firm, or corporation, engaged in or about to engage in an industrial or business activity in the Virgin Islands, which industrial or business activity, in the judgment of the Governor of the Virgin Islands will promote the public interest by economic development of the Virgin Islands, may apply for the same, if such person, firm, or corporation meets the following requirements:

(1) in the case of an individual or a partner in a firm, is a resident of the Virgin Islands, and in the case of a corporation, is created under the laws of the Virgin Islands;

(2) meets the requirements of subsection (b) or (c) of section 934 of the Internal Revenue Code of 1954, as amended (Public Law 86.779, 86th Cong., approved September 14, 1960), hereinafter referred to as I.R.C. sec. 934, or of any other applicable Federal law, and the provisions of this subtitle, or any regulations issued under such laws; and

(3) undertakes to invest in an industry or business in the Virgin Islands.

(A) at least $15,000 in an industry or business for the processing, manufacturing, creation or production of any articles, goods or commodities. (For the purposes of this

subparagraph the Virgin Islands Industrial Incentive Board shall in accordance with standards and classifications established by it determine the minimum percentages of the amount of initial investment as shall represent fixed assets and inventory for each industry or business.) Any such industry or business under this subparagraph shall maintain at all times a minimum investment of at least $15,000; or

* * * * * * * * * *

§ 4051. Employment of residents required; temporary permits

(a) Not less than 75 per cent of all persons employed in an industry or business with respect to which tax exemption or subsidy benefits are granted shall be legal residents of the Virgin Islands, provided however that the Board may grant a temporary permit for a period not to exceed six months at any one time, to an industry or business to employ a greater percentage of nonresidents of the Virgin Islands, after notice and public hearing, upon satisfactory proof to the Board that residents with the necessary ability to perform the services required at the prevailing wage rates, fixed by the Department of Agriculture and Labor are not available within the Virgin Islands and the industry or business will be greatly handicapped as a result thereof; and provided further that the Board shall revoke or modify the permit at any time before its expiration upon a finding that residents possessing the necessary ability have become available in the Virgin Islands and that such information has been furnished to the person, firm, or corporation engaged in the affected business or industry and no action has been taken to employ such residents. No person shall be denied employment serving or dispensing food or beverages in an industry or business granted tax exemption or subsidy benefits under the provisions of this subtitle solely by reason of sex.

* * * * * *

Subchapter III. Exemptions and Subsidies

§ 4061. Exemptions

(a) Each person, firm or corporation granted a certificate of tax exemption and subsidy benefits as hereinafter provided shall be exempt for a period of 10 years from the payment of the following taxes and fees:

(1) All taxes on real property to the extent that the same is utilized in the industrial or business activity with respect to which a tax exemption certificate has been granted.

(2) All excise taxes on building materials, tools, pipes, pumps, conveyor belts or other appliances and materials necessary for use in the construction, alteration, reconstruction or extension of the physical plant, or any extension thereof.

(3) All annual or specific license fees, except liquor license fees and automobile license fees; Provided, however, that in the case of a person, firm or corporation engaged in other industrial or business activity for which a certificate has not been granted, the full amount of all annual or specific license fees shall remain payable with respect to such nonexempt activity.

(b) The exemption from payment of the taxes and fees specified in subsection (a) of this section may be granted to a person, firm or corporation with respect to any part or all of the said taxes and fees, and either in addition to or without the granting of any part or all of the subsidies provided for in subsection (a) of section 4071 of this title. —Added Nov. 3, 1961, No. 798, § 2, Sess. L. 1961, p. 255; amended March 26, 1963, No. 990, § 1, Sess. L. 1963, p. 204; April 5, 1965, No. 1411, § 1, Sess. L. 1965, Pt. I, p. —.

§ 4071. Subsidies

(a) In addition to the foregoing benefits a person, firm or corporation granted a certificate of tax exemption and

subsidy benefits as hereinafter provided shall be entitled for a period of 10 years to the following benefits, as determined in accordance with the provisions hereof:

(1) A non-taxable subsidy equal to 90% of the amount (without deduction of administrative costs of collection) of import duties and other taxes paid into the Treasury of the Virgin Islands on raw materials brought into the Virgin Islands by such person, firm, or corporation for the purpose of producing or creating an article, goods or commodity as a result of industrial or manufacturing processing.

(2) A non-taxable subsidy equal to 75% of the income tax liability paid to the Government of the Virgin Islands during the taxable year. In the case of a corporation qualified and electing as a "small business corporation" under applicable law to have its taxable income taxed directly to its stockholders, the 75% non-taxable subsidy shall apply to such part of the income tax liability of the stockholders based upon the income derived from the corporation. The provisions of this subparagraph shall apply only with respect to stockholders who are bona fide residents of the Virgin Islands during the entire taxable year and who have supplied the information required by subsection (d) of I.R.C. sec. 934. In the computation of the non-taxable subsidy in the case of any person, firm or corporation under the provisions of this subparagraph, there shall not be considered as part of the base for such subsidy the taxes paid into the Treasury of the Virgin Islands on any income of such person, firm or corporation which is derived from sources within any of the states of the United States.

(3) In the case of a stockholder of a corporation granted a certificate of tax exemption or subsidy, a non-taxable subsidy in an amount equal to 75% of the income tax liability paid to the Government of the Virgin Islands on income derived by such stockholder as dividends from the corporation.

The provisions of this subparagraph shall apply only with respect to stockholders who are bona fide residents of the Virgin Islands during the entire taxable year and who have supplied the information required by subsection (d) of I.R.C. sec. 934.

(b) The subsidies provided for in subsection (a) of this section may be granted to a person, firm or corporation with respect to any part or all of the said subsidies and either in addition to or without the granting of any part or all of the exemptions from payment of taxes and fees provided for in subsection (a) of section 4071 of this title. —Added Nov. 3, 1961, No. 798, § 2, Sess. L. 1961, p. 256; amended March 26, 1963, No. 990, § 1, Sess. L. 1963, p. 204; April 5, 1965, No. 1411, § 2, Sess. L. 1965, Pt. I, p. —.

* * * * * *

Subchapter IV. Procedure and Administration

§ 4101. Virgin Islands Industrial Incentive Board

(a) The Virgin Islands Industrial Incentive Board, as created by section 35 of Title 3 (hereinafter referred to as the "Board"), shall administer the provisions of this subtitle. The Board shall be empowered to:

(1) Investigate all applications for tax exemptions or subsidies and recommend to the Governor the granting of certificates for the same to persons, firms, or corporations determined by the Board to qualify for the same, and to investigate and determine compliance with the provisions of this subtitle or regulations thereunder.

* * * * *

(b) The Board shall act upon all applications and claims submitted to it and make recommendation to the Governor as to the granting of a certificate of tax exemption or subsidy within 60 days from the receipt by the Board of all information required from the applicant under this subtitle or the regulations issued hereunder. In the event determination is hindered or delayed by causes outside

the control of the Board, the period for such determination shall be suspended during the period of such hindrance or delay, not to exceed 30 days in any event unless extended by the Governor of the Virgin Islands. Upon the expiration of such period for determination, or extension thereof by the Governor, as hereinbefore provided, an application shall be deemed to be disapproved.—Added Nov. 3, 1961, No. 798, § 2, Sess. L. 1961, p. 257.

§ 4102. Applications

Applications for certificates of tax exemption or subsidy shall be filed on such forms and at such times as shall be prescribed for such purpose by the Board from time to time. — Added Nov. 3, 1961, No. 798, § 2, Sess. L. 1961, p. 258.

§ 4103. Hearings

The Board shall conduct public hearings on all applications for certificates of tax exemption or subsidy and shall give public notice in local newspapers of general circulation in the Virgin Islands of all applications. — Added Nov. 3, 1961, No. 798, § 2, Sess. L. 1961, p. 258.

§ 4104. Granting of certificates of exemption and subsidy

Upon a finding by the Board that an applicant has demonstrated to its satisfaction that:

(1) the industrial or business activity engaged in or about to be engaged in by such applicant will promote the public interest by economic development of the Virgin Islands;

(2) the establishment or expansion of the activity in the Virgin Islands requires incentive in the form of the granting of the tax exemption and subsidy benefits; and

(3) the applicant otherwise qualifies under the provisions of this title—

the Board shall recommend to the Governor of the Virgin Islands the granting of a certificate of tax exemption and subsidy benefits, which certificate shall be in the manner and form as provided for in section 4105 of this title.

§ 4105. Certificate of tax exemption and subsidy

A certificate of tax exemption and subsidy shall be issued in the name of the Government of the Virgin Islands by the Governor, upon his approval of the recommendation of the Board, and shall specify:

(1) the date by which the required financial investment shall have been completed by the particular person, firm or corporation;

(2) the date upon which the exemption from payment of taxes and fees and the granting of subsidy shall commence, which date may be retroactive to the first date of investment by the person, firm or corporation in the industry or business granted the certificate, but such date shall not be before the effective date of this subtitle: Provided, however, that the grant of certificates of tax and fee exemption, and the grant of subsidy benefits shall be coterminous;

(3) that the grant of certificates of tax exemption and subsidy benefits shall be for an aggregate of ten (10) years from the date of commencement specified in the certificate;

(4) such other conditions as the Board shall deem applicable or appropriate, not inconsistent with the provisions of this subtitle or regulations hereunder.

* * * * * *

§ 4112. Approval by the Governor; administrative finality

All determinations, decisions or orders of the Board relating to the qualification of applicants hereunder or to the

issuance, revocation, modification, suspension or transfer of certificates of tax exemption or subsidy benefits, shall be subject to the approval of the Governor, and no certificate, or any revocation, modification, suspension or transfer thereof shall be deemed valid without the written approval of the Governor.—July 5, 1957, No. 224, § 14; amended Apr. 29, 1959, No. 395, § 5; Nov. 3, 1961, No. 798, § 2, Sess. L. 1961, p. 262.

§ 4113. Appeals

Any person, firm or corporation aggrieved by any action of the Governor under the provisions of this subtitle shall be entitled to judicial review thereof by filing an appeal with the District Court of the Virgin Islands, within 30 days after final decision by the Governor. Upon such review all findings, decisions or determinations by the Governor as to questions of fact shall be deemed final in the absence of conclusive showing to the Court of fraud or misrepresentation.—July 5, 1957, No. 224, § 8; amended Apr. 29, 1959, No. 395, § 5; Nov. 3, 1961, No. 798, § 2, Sess. L. 1961, p. 262.

III

Section 36 of the Organic Act of the Virgin Islands (48 U.S.C.A. § 1406(i)) provides:

> "Sec. 36. Taxes and assessments on property and incomes, internal-revenue taxes, license fees, and service fees may be imposed and collected, and royalties for franchises, privileges, and concessions granted may be collected for the purposes of the Government of the Virgin Islands as may be provided and defined by the municipal councils herein established: *Provided,* That all money hereafter derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury of the Virgin Islands and paid out for such purpose only, except when otherwise authorized by the legislative authority having jurisdic-

tion after the purpose for which such fund was created has been accomplished. Until Congress shall otherwise provide, all laws concerning import duties and customs in the municipality of Saint Thomas and Saint John now in effect shall be in force and effect in and for the Virgin Islands: *Provided,* That the Secretary of the Treasury shall designate the several ports and sub-ports of entry in the Virgin Islands of the United States and shall make such rules and regulations and appoint such officers and employees as he may deem necessary for the administration of the customs laws in the Virgin Islands of the United States; and he shall fix the compensation of all such officers and employees and provide for the payment of such compensations and other expenses of the collection of duties, fees and taxes imposed under the customs laws from the receipts thereof. The export duties in effect on the date of enactment of this Act may be from time to time reduced, repealed, or restored by ordinance of the municipal council having jurisdiction: *Provided further,* That no new export duties shall be levied in the Virgin Islands except by the Congress." 49 Stat. 1816-1817.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1163

VIRGO CORPORATION, *Petitioner*

v.

RALPH M. PAIEWONSKY, MORRIS F. DECASTRO, ALBERT PRENDERGAST, PERCY DEJONGH, RUBEN WHEATLEY, MAHLEN LINDQUIST, ADOLPH POTTER, JOSEPH ALEXANDER, PERCY GARDINE, and the GOVERNMENT OF THE VIRGIN ISLANDS.

MOTION OF ANTILLES INDUSTRIES, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF ANTILLES INDUSTRIES, INC. AS AMICUS CURIAE.

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PRESS OF BYRON S. ADAMS

IN THE

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ON PETITION OF VIRGO CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Antilles Industries, Inc. respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the petition herein.[1] The consent of counsel for petitioner has been obtained but

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[1] Petition of Virgo Corporation to review *Virgo Corporation* v. *Paiewonsky et al.* (3 Cir. 1967) 384 F. 2d 569.

counsel for respondent refused consent to the filing of said brief.

Applicant, Antilles Industries, Inc., has an interest in this case for the following reasons:

1. The Government of the Virgin Islands has asserted a tax liability against applicant under the provisions of the Watch Production Act of the Virgin Islands,[2] as amended.[3] The validity of that Act is in issue in this proceeding. The United States District Court for the Virgin Islands held the law and the tax which it imposes to be invalid.[4] The Court of Appeals for the Third Circuit reversed.[5] If the decision of the court below is not reversed, applicant will be liable to pay this tax.

2. Applicant heretofore has filed an application with the Virgin Islands Industrial Incentive Board for tax exemption and subsidy benefits under the Industrial Incentive Act[6] of the Virgin Islands. Following failure of the Industrial Incentive Board and of the Governor of the Virgin Islands to take action on this application, applicant filed suit in the United States District Court

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[2] Act of August 30, 1965, No. 1518, V.I. Sess. L. 1965, p. 470 *et seq.*; 33 V.I.C. §§ 511-518.

[3] Act of March 22, 1966, No. 1631, V.I. Sess. L. 1966, p. 98 *et seq.*; 33 V.I.C. §§ 511-518 as amended.

[4] *Virgo Corporation* v. *Paiewonsky et al.* (D.V.I. 1966) 251 F. Supp. 279.

[5] *Virgo Corporation* v. *Paiewonsky et al.* (3 Cir. 1967) 384 F. 2d 569.

[6] Act of November 3, 1961, No. 798, V.I. Sess. L. 1961, p. 252 *et seq.*; 33 V.I.C. § 4001 *et seq.*

for the Virgin Islands[7] requesting among other things that the court direct respondents to issue the tax benefits to it. The issues involved in this proceeding are dispositive of applicant's right to receive the tax benefits sought in the aforesaid litigation. Said litigation is being held in abeyance pending final determination of this proceeding.

Under the decision of the District Court, herein,[8] applicant would be entitled to said tax incentive benefits. Applicant would not be so entitled if the decision of the court below is permitted to stand.

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[7] *Antilles Industries, Inc.* v. *Paiewonsky et al.*, Civil Action No. 15/1966, U.S. District Court for the Virgin Islands.

[8] *Supra*, Note 4.

MOTION OF ANTILLES INDUSTRIES, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF ANTILLES INDUSTRIES, INC. AS AMICUS CURIAE.

The attached brief of Antilles Industries, Inc., as *amicus curiae* will, if permission to file is granted, present points and discussion not developed in the briefs of petitioner before the court below, and applicant has no assurance that these points will be advanced and discussed before this Court. If these points and argument thereunder are approved by this Court, the decision of the court below must be reversed.

Because of the effect of the decision below upon applicant and its potential effect upon commerce between the Territory of the Virgin Islands and the United States, Antilles Industries, Inc. respectfully requests permission to file a brief *amicus curiae.*

Respectfully submitted,

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Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File Brief as Amicus Curiae and the appended Brief Amicus Curiae was mailed, postage prepaid, to William Simon, Esquire, 1707 H Street, N. W., Washington, D. C., Counsel for petitioner, and to the Honorable Attorney General of the U.S: Virgin Islands, Charlotte Amalie, U.S. Virgin Islands.

JOHN D. CONNER
Counsel for Applicant

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BRIEF OF AMICUS CURIAE ON BEHALF OF ANTILLES INDUSTRIES, INC. IN SUPPORT OF THE PETITION OF VIRGO CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

INTEREST OF AMICUS CURIAE

Antilles Industries, Inc. (hereinafter referred to as "Antilles") is a corporation organized and existing under the laws of the United States Virgin Islands (hereinafter sometimes referred to as "the Territory") and having its principal place of business at Orange Grove, Christiansted, St. Croix. Antilles, since 1963, has engaged in the assembly of imported watch parts and subassemblies into jeweled-lever wristwatch movements the entirety of which are exported to the United States. Antilles' operations are essentially identical to those of petitioner, and of the other members of the newly established watch industry in the Virgin Islands.[1]

Antilles acquired its watch assembly operations in the Virgin Islands in reliance upon two primary economic factors, both of which are at issue in this proceeding:

1. The right to ship the watches which it assembled in the Virgin Islands to the United States without the payment of duty in reliance upon the provisions of Headnote 3(a) of the Tariff Schedules of the United States,[2] and

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[1] The favorable tariff considerations which have encouraged the establishment of this industry are discussed in the opinion of the District Court herein, *Virgo Corporation* v. *Paiewonsky* (D.V.I 1966) 251 F. Supp. 279, 281-283, and in S. Rep. No. 1647, 89th Congress, 2d Session.

[2] 19 U.S.C.A. § 1202.

2. The right to receive tax incentive and subsidy benefits under the provisions of the Virgin Islands Industrial Incentive Act.[3]

Following enactment of the Watch Production Act of the Virgin Islands[4] Antilles applied for and was granted a quota for the shipment of watches to the United States. It also applied for and was denied an additional quota from the overall supplemental quota established for hardship cases and new companies. Because the $2.47 tax applicable to over-quota shipments to the United States made such shipments economically unfeasible and because the quota established was so limited, Antilles was forced substantially to curtail its shipment of watch movements to the United States. The demand for its watch movements from its established customers was substantially in excess of its quota.

Accordingly, after the District Court herein declared the Watch Production Act as originally enacted[5] and as amended[6] to be invalid, Antilles in reliance upon these decisions increased its production and shipment to the United States. In further reliance upon these decisions, Antilles did not pay the tax imposed by the

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[3] Act of November 3, 1961, No. 798, V.I. Sess. L. 1961, p. 252 *et seq.*; 33 V.I.C. § 4001 *et seq.*

[4] Act of August 30, 1965, No. 1518, V.I. Sess. L. 1965, p. 470 *et seq.* as amended by Act of March 22, 1966, No. 1631, V.I. Sess. L. 1966, p. 98 *et seq.*; 33 V.I.C. §§ 511-518, as amended.

[5] *Virgo Corporation* v. *Paiewonsky et al.*, (D.V.I. 1966) 251 F. Supp. 279, 286.

[6] *Virgo Corporation* v. *Paiewonsky et al.*, (D.V.I. 1966) 254 F. Supp. 405, 414.

Watch Production Act.[7] Following the reversal by the court below, the Government of the Virgin Islands through the Department of Finance has made a demand upon Antilles for the payment of taxes which it contends accrued under said Act prior to its repeal.[8] A copy of the letter containing this demand is attached hereto as Appendix A.

Shortly after it established watch assembly operations in the Virgin Islands, Antilles made application to the Virgin Islands Industrial Incentive Board for the tax incentive and subsidy benefits extended by the Virgin Islands Industrial Incentive Act[9] but it has been denied the benefits of that statute. Antilles brought a civil action[10] to compel respondents to grant to it the benefits to which it is entitled under this Act. Said litigation is being held in abeyance pending final determination of this proceeding.

Under the decisions of the District Court herein,[11] Antilles would have no liability for the tax which the Government of the Virgin Islands is now demanding and would be entitled to receive the tax incentive and subsidy benefits extended by the Virgin Islands In-

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[7] *Supra*, Note 4.

[8] The Watch Production Act was repealed effective January 1, 1967, after the Congress of the United States enacted legislation to impose quotas on watches imported into the United States from the Virgin Islands, Guam and American Samoa. [Act of January 27, 1967, No. 1835, Sess. L. 1967.]

[9] *Supra*, Note 3.

[10] *Antilles Industries, Inc.* v. *Paiewonsky et al.*, Civil Action No. 15/1966, U.S. District Court for the Virgin Islands.

[11] Supra, Notes 5 and 6.

dustrial Incentive Act.[12] Under the decision of the court below, Antilles would be liable for the payment of the tax and would continue to be denied the subsidy benefits.

PUBLIC INTEREST

The questions involved in this proceeding are of substantial significance to each of the members of the newly developed Virgin Islands watch industry. In addition, the questions are of substantial public interest.

Directly at issue is the power of the Government of the Virgin Islands to tax or otherwise to regulate the shipment of watches or other commodities into the channels of the interstate commerce of the United States. Involved also is the consistency of the statutes of the Virgin Islands legislature with the enactments of the Congress of the United States.

ARGUMENT

I.

The Court Below Erred in Holding That the Portion of Section 36 of the Organic Act of 1936 for the Virgin Islands Which Provides That No New Export Duties Shall Be Levied in the Virgin Islands Except by Congress Was Repealed by Implication by the Revised Organic Act of 1954.

The District Court herein held that the proviso clause of Section 36 of the Organic Act of the Virgin Islands[13] of the United States providing "that no new export duty shall be levied in the Virgin Islands except by Congress" was not repealed by the Revised

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[12] *Supra*, Note 3.

[13] Act of June 22, 1936, ch. 699, 49 Stat. 1816, 48 U.S.C. § 1406i.

Organic Act of the Virgin Islands[14] and that therefore the Legislature of the Virgin Islands has no power to levy new export duties.[15]

On appeal the court below held that this proviso clause of Section 36 of the Organic Act of the Virgin Islands was repealed *by implication* by the revised Organic Act of 1954.

The court below recognized that the Organic Act of the Virgin Islands of 1936 was not specifically repealed. It appears to have based its conclusion that the revised Organic Act of 1954 impliedly repealed the Organic Act of 1936 upon the following legislative history:

1. The Senate Bill, S.3378, contained a section which read:[16]

> Section 34. Except to the extent necessary to implement the provisions of section 35, the Act of June 22, 1936 (49 Stat. 1807), and any other provisions of law inconsistent with this Act are hereby repealed.

The House, in passing S.3378 substituted the following language:[17]

> Section 34. Except to the extent necessary to implement the provisions of section 31 hereof and

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[14] Act of July 22, 1954, Ch. 588, 68 Stat. 497, 48 U.S.C. § 1541 *et seq.*

[15] *Virgo Corporation* v. *Paiewonsky, et al.* (D.V.I. 1966) 251 F. Supp. 279, 283.

[16] *Virgo Corporation* v. *Paiewonsky et al.* (3 Cir. 1967) 384 F. 2d 569, 577 citing 100 Cong. Rec. 6654.

[17] *Id.* at 577-578, citing 100 Cong. Rec. 8673.

> except with reference to the authority of the Secretary of the Treasury under section 36 of the Act of June 22, 1936 (49 Stat. 1807), said act and other provisions of law inconsistent with this act are hereby repealed.

However, the court, after recognizing that the law as enacted contained neither of these provisions, observed that this section may have been omitted by inadvertence.

2. The Revised Organic Act of 1954 described the legislative authority of the Virgin Islands as follows:

> Section 8(a). The legislative authority and power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands.[18]

The court pointed out that in 1958 this legislative authority was broadened by amending Section 8(a) to read as follows:[19]

> The legislative authority and power of the Virgin Islands shall extend to all rightful subjects of legislation not inconsistent with this Act nor the laws of the United States made applicable to the Virgin Islands . . .

The court below thus concluded:[20]

> It thus seems clear that the revised Organic Act of 1954 operated to repeal the Organic Act of 1936.

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[18] *Id.* at p. 578, citing 68 Stat. 500.

[19] *Id.* at p. 578.

[20] *Ibid.*

This conclusion overlooks the specific provisions of Section 8(c) of the Revised Organic Act[21] that:

> (c) The laws of the United States applicable to the Virgin Islands on July 22, 1954, including laws made applicable to the Virgin Islands by or pursuant to the provisions of the Act of June 22, 1936, [49 Stat. 1807] and all local laws and ordinances in force in the Virgin Islands, or any part thereof, on July 22, 1954, shall, to the extent that they are not inconsistent with this chapter, . . . continue in force and effect until otherwise provided by the Congress: . . .

Accordingly, the Revised Organic Act of 1954 specifically provided that the provisions of the Organic Act of 1936 would continue in force and effect *except to the extent that the provisions of the 1936 Organic Act are inconsistent with the provisions of the 1954 Act.*

The court below did not suggest that the proviso of Section 36 of the Organic Act of 1936 *prohibiting the Legislature of the Virgin Islands from imposing an export duty* was inconsistent with any portion of the 1954 Revised Organic Act. Unless some such inconsistency can be demonstrated, (and none is known to Antilles) the 1954 Act must be read as continuing this provision in Section 36 of the 1936 Organic Act, thereby continuing the prohibition against the imposition by the Legislature of the Virgin Islands of any export duty.

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[21] *Supra*, note 14.

II.

The Court Below Erred in Holding That the Tax Imposed by the Virgin Islands Watch Production Act Did Not Constitute an Export Duty.

The trial court in this proceeding, after an exhaustive review of the history and purpose of the Act said:

> There can be no other interpretation of the Watch Production Quota Act than it being an export duty upon watches entering the "customs area of the United States."[22]

The Court of Appeals looking only to the form of the tax held it to be:

> Essentially an excise tax levied on the production of watches in the Virgin Islands, a process local in nature and complete in itself.[23]

This conclusion overlooks the obvious fact that of the total tax of $2.50 per watch, only 3 cents per watch was payable unless the watches were shipped to the United States in excess of quota.

After the District Court declared the Watch Production Act to be invalid,[24] the Congress of the United States enacted legislation imposing quotas on the importation of watches from the Virgin Islands.[25] The Report of the Senate Finance Committee upon this legislation[26] recognized that the sole purpose of the

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[22] *Supra*, note 5 at 283; see also *supra*, note 6 at 413-414.

[23] *Supra*, note 16 at p. 10.

[24] *Supra*, note 5.

[25] P.L. 89-805, 80 Stat. 1521.

[26] S. Rept. 1679, 89th Cong., 2d Sess.

Virgin Islands Watch Production Act had been to limit the export of watches from the Virgin Islands to the United States. In that Report it was stated:

> In an effort to control the watch assembly operations and to forestall Congressional legislation which would have prohibited duty free importation of watches assembled in the possessions, the Virgin Islands Legislature, on August 30, 1965, enacted legislation (Bill No. 2638) designed to limit watch assembly there for export to the United States to a quantity roughly equivalent to one-ninth of total apparent United States watch consumption for the preceding year. This local quota statute was attacked in the courts, and on March 14, 1966 was declared invalid by the United States District Court of the Virgin Islands (Virgo Corporation v. Paiewonsky, Civ.No. 165-1965.)[27]

The conclusion of the court below that the tax is not an export tax flies in the face of this Court's long-standing practice of determining the constitutionality of a taxing scheme by concerning itself "... with the practical operation of the tax, that is, substance rather than form." *American Oil Co.* v. *Neill et al.*, 380 U.S. 451, 455 (1965); see also: *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 443-444 (1910); *Lawrence* v. *State Tax Comm'n.*, 286 U.S. 276, 280 (1932). The Court's concern is directed toward the ultimate effect of the law as applied and enforced. *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80 (1938); *Stewart Dry Goods Company* v. *Lewis*, 294 U.S. 550, 580 (1935); *Galveston, Harrisburg and San Antonio Railway Co. et al.* v. *State of Texas*, 210 U.S. 217 (1808); *Postal Telegraph Cable Co.* v. *Adams etc.*, 155 U.S. 688 (1895).

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[27] *Id.* at p. 5.

The Watch Production Act imposed a tax upon the right to export—a tax upon goods because of the fact that they are being exported or intended to be exported. Such taxes are *export taxes. Coe* v. *Town of Errol,* 116 U.S. 517, 526 (1886); *Turpin* v. *Burgess,* 117 U.S. 504, 507 (1886).[28]

III.

The Court Below Erred in Holding That the Governor of the Virgin Islands, in Administering the Industrial Incentive Act, May Apply to Each Individual Applicant for Tax Exemption and Subsidy Benefits the Test of the Need for "The Stimulus of Such Government Assistance."

The Industrial Incentive Act of the Virgin Islands[29] (hereinafter the "Incentive Act") empowers the respondent Governor to grant tax benefits[30] upon a finding that the industrial or business activity engaged in will promote the public interest by economic development of the Virgin Islands, that the establishment or

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[28] Regulations adopted under the Watch Production Act provided for verification of the quantity of watches subject to tax by reference to the customs records revealing shipments to the United States. Title 33 Virgin Islands Rules and Regulations § 517-4.

[29] *Supra,* note 6.

[30] The program authorizes, for a period of ten years, an exemption from all real estate taxes; all excise taxes on construction tools and materials; and all license fees except those applicable to liquor and automobiles. In addition, the following subsidies are provided: (1) A nontaxable subsidy equal to 90 percent of the import duties on raw materials brought into the Virgin Islands; (2) A non-taxable subsidy equal to 75 percent of the income tax liability paid to the Government of the Virgin Islands during the taxable year; and (3) a nontaxable subsidy of 75 percent of the income tax paid to the Government of the Virgin Islands on dividends received by stockholders of a corporation granted tax exemption or subsidy, providing the stockholder was a resident of the Virgin Islands during the taxable year.

expansion of the activity in the Virgin Islands requires incentive in the form of granting the tax exemption and subsidy benefits, and that the applicant is otherwise qualified under the provisions of the program.

Pursuant to the Incentive Act, respondents awarded tax exemption and subsidy benefits to four companies which had started watch assembly operations in the Virgin Islands.[31] The granting of these benefits necessarily constituted a finding by the respondents that the industrial activity engaged in, namely, the assembling of watch movements, would meet the requirements of the Incentive Act.[32]

Both petitioner and Antilles conduct watch assembly operations which are substantially identical to the operations of the four companies granted tax incentive benefits. Both petitioner and Antilles applied in 1963 for tax exemption and subsidy benefits. On December 9, 1964, each company received a letter [33] from respondents advising that the Governor had directed that all pending applications for tax exemption be "frozen" for an indefinite time because "a controversy exists over our watch industry in regards to its effect on the mainland."

The District Court held that respondents had no authority to refuse tax exemption to an applicant which demonstrates its compliance with all statutory

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[31] Standard Time Corporation, Christiansted, St. Croix; Unitime Corporation, Christiansted, St. Croix; Quality Products Co., Inc., St. Thomas; and Admiral Time, Inc., Christiansted, St. Croix.

[32] So held by the District Court *Virgo Corporation* v. *Paiewonsky et al.* (D.V.I. 1966) 251 F. Supp. 279, 285.

[33] *Id.* at 284.

conditions merely "because the Governor believes that other considerations should enter into . . . [the] deliberations and recommendations" respecting the granting of tax incentive benefits [34] and ordered the respondent members of the Industrial Incentive Board to consider petitioner's application and recommend disposition to the Governor. The Board considered and recommended partial tax exemption; the Governor disapproved the recommendation and the District Court ordered the Governor to grant tax exemption.[35]

The court below reversed, holding that the Governor acted within his discretionary power in refusing tax incentive benefits to petitioner because petitioner ". . . as evidenced by its substantial profit return, does not require the stimulus of governmental assistance as provided for by the law." [36]

A. The Statutory Test Is Properly Applicable Only to the "industrial or business activity" Concerned and Not to Each Individual Applicant.

In substance the court below held that the Governor can make a separate finding as to whether each individual member of the watch industry of the Virgin Islands requires the incentive of tax exemption and subsidy benefits.

All members of the Virgin Islands watch industry operate under substantially similar conditions. Each engages in substantially the same type of operation of

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[34] Citing: *Vitex Manufacturing Co.* v. *Government of the Virgin Islands* (3 Cir. 1965) 351 F. 2d 313.

[35] *Supra*, note 6.

[36] *Virgo Corporation* v. *Paiewonsky, et al.* (3 Cir. 1967) 384 F. 2d 569, 584.

importing parts from abroad, assembling the parts in the Virgin Islands and exporting a completed movement to the United States. The amount of labor and skill required in the assembly operations is substantially the same for each member of the industry. The tariff provisions under which the entire industry operates are the controlling economic factors.

It is these industry-wide conditions which dictate a need or lack of need for the stimulus of tax incentive and subsidy benefits—not any economic conditions which are peculiar to any individual member of the industry. The standards of the Incentive Act were intended to be applied on an industry-wide basis.

When the Governor granted tax incentive and subsidy benefits to Standard Time Corporation, Unitime Corporation, Quality Products Company and Admiral Time, Inc., he of necessity made a finding that the Virgin Islands watch industry, including these companies, required this relief.

Insofar as Antilles is aware no record exists either in this proceeding or elsewhere which shows the factors which the Governor considered in granting tax incentive and subsidy benefits to these four members of the industry. However, whatever those factors were, they would have been equally applicable to Virgo Corporation and Antilles.

This argument does not mean that, once the Governor makes a finding that a company or an industry requires tax incentive and subsidy benefits he is thereafter precluded from changing this finding and determining that the industry no longer requires such subsidy benefits. It means only that, until the conditions upon which the original finding was based, are

changed, the same factors must be applied to each member of the industry.

Both Virgo Corporation and Antilles applied for tax exemption and subsidy benefits in 1963. No action was taken until December 9, 1964 at which time the companies were advised only that the Governor had frozen for an indefinite time the pending applications because of a controversy over the watch industry. It was not until 1967, approximately four years after the applications were filed, that the Governor found that Virgo Corporation did not require tax incentive and subsidy benefits. This finding presumably was based not upon a profit picture that was peculiar to Virgo Corporation, but one which was common to each member of the industry.

No such finding has been made by the Governor with respect to Antilles but it is anticipated that, if Antilles now presses its application, the Governor would make such a finding with respect to it.

B. If the Statutory Test Is Construed To Be Applicable to Each Individual Applicant, the Industrial Incentive Act Constitutes Special Legislation in Violation of Title 48, Section 1471.

If the Incentive Act is construed to authorize the Governor to grant tax incentive and subsidy benefits to four members of the watch industry and to deny such benefits to two other members of the same industry which are operating under substantially similar competitive conditions, the Act must be considered to be special legislation in violation of the Act of July 30, 1886.[37]

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[37] Act of July 30, 1886, 24 Stat. 170, U.S.C., Title 48, § 1471.

This law in pertinent part provides:

> The legislatures of the Territories of the United States now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say . . .
>
> Granting to any corporation, association, or individual any special or excessive privilege, immunity, or franchise whatsoever.

The prohibition of this section against the enactment of special laws has recently been held applicable to the Virgin Islands in *Smith* v. *Government of the Virgin Islands* (3 Cir. 1967) 375 F. 2d 714.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for certiorari of Virgo Corporation be granted.

Respectfully submitted,

ANTILLES INDUSTRIES, INC.

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H. H. HULSE, ESQUIRE
GENERAL TIME CORPORATION
High Ridge Park
Stamford, Connecticut

APPENDIX

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNITED STATES
CHARLOTTE AMALIE, ST. THOMAS
DEARTMENT OF FINANCE
TAX DIVISION

January 19, 1968

Antilles Industries, Inc.
Orange Grove
Christiansted, St. Croix
U. S. Virgin Islands 00820

Gentlemen:

The United States Court of Appeals for the Third Circuit in Virgo Corporation, Docket No. 16116, and Master Time Company, Ltd., Docket No. 16133, vs. the Government of the Virgin Islands on September 29, 1967 held that the Watch Production Act of 1965, both as originally enacted and as amended in 1966 was valid and did not violate the commerce clause of the Constitution or the due process clause of the Revised Organic Act.

The Watch Production Act and its Amendment (Title 3, Sections 511-518 of the Virgin Islands Code) imposes a tax at the rate of 3 cents per watch, clock or unit of timing apparatus upon the amount of production for each category of product set forth in determinations and allocations made by the Governor of the Virgin Islands, and a rate of tax on the excess of $2.50 per watch, clock or unit of timing apparatus.

The Watch Production Act and its Amendment were repealed by Act No. 1835, Seventh Legislature of the Virgin Islands, effective January 1, 1967. Section 2 of Act No. 1835 provides as follows:

"Nothing herein shall be construed to affect the liability of manufacturers heretofore covered by such sections 511 through 518 of Title 33 for taxes under such sections upon watches, clocks and timing apparatus sold, or removed for sale, consumption or use as of any date up to and including December 31, 1966. All provisions of said sections, or any orders, rules or regulations issued thereunder, relating to the submismission of proof in connection with the establishment of the rate or rates of tax applicable, or to the submission of forms, reports or any other material relating to the tax liability of such manufacturers under said sections, up to and including December 31, 1966, are continuing in force and effect until otherwise provided by law".

A copy of the Regulations adopted pursuant to Section 517, Title 33 of the Virgin Islands Code is attached to this letter.

All watch production companies that have resisted payment of the production tax on watches pending the outcome of the court action against the Government of the Virgin Islands should take immediate action to file delinquent tax returns with remittance to cover taxes due up to and including December 31, 1966, with the Tax Division, Department of Finance. Likewise, all watch production companies are requested to file the inventory reports required under Section 517.7 of the Regulations immediately.

The delinquent production tax returns and inventory reports should be filed no later than thirty (30) days from the date of this letter.

Yours very truly,

VIGGO A. HENDRICKS
Viggo A. Hendricks
Chief, Processing & Accounts Branch

Enclosure

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

MASTER TIME COMPANY, LTD., a Virgin Islands Corporation, *Petitioner,* v. THE HONORABLE PERCY DEJONGH, etc., *Respondents,*	No. 1082
and VIRGO CORPORATION, a Virgin Islands Corporation, *Petitioner,* v. RALPH M. PAIEWONSKY, Governor of the Virgin Islands, et al., *Respondents.*	No. 1163

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The opinion of the Court of Appeals in both cases was consolidated in one opinion and reported at 384 F. 2d 569 (1967). The opinions of the District Court are reported at 5 V.I. 342, 251 F. Supp. 279; 5 V.I. 359, 254 F. Supp. 405, and 5 V.I. 417, 259 F. Supp. 26.

Questions Presented

1. Whether the legislative powers of the Virgin Islands may provide for taxation upon the manufacture of watches though the bulk of such manufactured watches are shipped to the United States.

2. Whether the Government of the Virgin Islands may deny tax exemption to an applicant on the statutory criterion of need.

Statutes Involved

The statutes involved in consideration of the first question raised by the Petitions are as follows:

Section 36 of the Organic Act of the Virgin Islands —June 22, 1936, Ch. 699, Sec. 36, 49 Stat. 1816 (MT 66a)*

August 28, 1958—Amendment to Revised Organic Act of the Virgin Islands. Public Law 85—851; 72 Stat. 1094 [H.R. 12303]; (M.T. 67a)

Act No. 1518, approved August 30, 1965 (V. I. Sess. L. 1965, p. 470)

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* "MT" refers to the Appendix attached to the Master Time Company Brief; "V" refers to the Appendix attached to the Virgo Corporation Brief.

Act No. 1631, approved March 22, 1966 (V. I. Sess. L. 1966, p. 98)

The statutes involved in consideration of the second question, raised only by the petitioner Virgo Corporation, are contained in 33 V.I.C. sec. 4001 et seq., which pertinent portions are contained in the Appendix to the Petition of Virgo Corporation (V 78a-86a).

Statement

Respondent adopts as its Statement of Facts material to the consideration of the questions here presented the summary of the facts contained in the Opinion of the Court of Appeals.

REASONS FOR DENYING THE WRITS

I. The Court of Appeals has correctly decided that the Legislature has the authority to enact a statute which levies a tax on the manufacture of watches and that such tax is not in violation of the Commerce Clause of the Constitution nor is it a tax upon exports.

The appellants in both cases contend that the Watch Production Quota Tax (imposed by Acts Nos. 1581 and 1631) is either a tax upon exports forbidden by the Constitution and by the Organic Act of the Virgin Islands of 1936 (MT 66a), or in the alternative, in violation of the Commerce Clause of the Constitution.

The fallacy of this reasoning is that both appellants are unwilling to categorize "shipments to the United States" as exports, or in the alternative, as commerce between the States (or between States and Territories

likened to States so as to bring into force the application of the Commerce Clause). These "shipments" must be for purposes of Constitutional inquiry, either

(a) exports; or

(b) commerce between States (or States and Territories likened to States). They must fit into some singular category.

The Government of the Virgin Islands contends that in full accord with precedents established by this Court, shipments from the Virgin Islands to the Continental United States are not exports. With the extension of its legislative authority and power, the Virgin Islands may be considered to have acquired some of the attributes of a state; nevertheless, it remains "an unincorporated territory of the United States" under the Revised Organic Act of 1954, 68 Stat. 497, sec. 2, 48 U.S.C.A., sec. 1541(a). Since it is not a state, it, like Puerto Rico, does not suffer the constitutional impediments applicable to a state. "The constitutional prohibition upon the imposition of duties or imposts on imports [or exports] is inapplicable because that prohibition is laid upon the states, and Puerto Rico, as we frequently have occasion to say, is not a state but an organized territory not incorporated into the United States." *Buscaglia* v. *Ballester,* 162 F. 2d 805, 807 (1st Cir., 1947), cert. den. 332 U.S. 816. Conversely, unlike the Phillippine Islands before it was given in many respects the status of an independent government, the Virgin Islands is not to be regarded as foreign territory. *Cf. Barber* v. *Gonzales,* 347 U.S. 637, 642, 98 L. ed. 1009, 1013 (1954); *Hoover & Allison Co.* v. *Evatt,* 324 U.S.

652, 677, 89 L. ed. 1252, 1270 (1945). "The words 'imports' and 'exports' as therein used [Art. I, Sec. 10, U.S. Const.], have been held to apply only to articles imported from, or exported to, foreign countries." *Patapsco Guano Company* v. *North Carolina Board of Agriculture,* 171 U.S .345, 350, 43 L. ed. 191, 193 (1898). Thus the shipment from the Virgin Islands to the United States is neither an export nor an import under the prohibition on state import and export duties.

Thus it is contended that shipments from the Virgin Islands to the continental United States fall within the realm of *commerce,* not exports. But even in this area, assuming the regulation of such "commerce" by the Virgin Islands Legislature, it is contended that there are no constitutional impediments. The impediments of regulating commerce runs against states or territories which have achieved certain attributes of states, not against "unincorporated territories.

No section of the Revised Organic Act of the Virgin Islands, or of any other law of Congress, states that the Constitution is extended to the Virgin Islands, whereas both the Organic Acts of Hawaii (48 U.S.C.A. sec. 495, 47 Stat. 205) and Alaska (48 U.S.C.A. sec. 23, 37 Stat. 512) specifically provided that the Constitution was extended to those states when they were territories. Indeed, it is well settled that except for certain provisions which guarantee or secure certain fundamental personal rights, or which limit the exercise of executive and legislative power when enacted for and over the insular possessions, the Constitution does not follow the flag into unincorporated territories. *Balzac* v. *People*

of Puerto Rico, 258 U.S. 298, 66 L. ed. 627 (1922). The Congress, in the Revised Organic Act of the Virgin Islands included a "Bill of Rights" which covers substantially every one of the guaranties of the Federal Constitution. A similar provision in the Organic Act of Puerto Rico (39 Stat. at L. 951, chap. 145, known as the "Jones Act") was held by the Supreme Court in the *Balzac* case to be a conclusive argument against the contention that the Constitutional guaranties applied *ex propio vigore* to Puerto Rico.

Because the Virgin Islands is not a state but a territory, the legislative power of the Congress, and its authority to delegate that power to the territorial government, is derived from the constitutional grant of plenary control over territories, without restriction by the Commerce Clause. "Since its power . . . as to a territory like Puerto Rico is plenary except as limited by express constitutional restrictions, Congress is not fettered by the commerce clause, Const. Art. I, Sec. 8, Cl. 3, in its power to legislate for Puerto Rico." *Cases* v. *United States,* 131 F. 2d 916, 923 (1st Cir., 1942), cert. den. 319 U.S. 770 (1943), reh. den. 324 U.S. 889 (1945). Similarly, the Congress is not limited by the commerce clause in the extent to which it may delegate its legislative authority:

> "The commerce clause gives Congress plenary power to regulate our foreign and interstate commerce and thus as a necessary consequence it has the secondary effect of a restriction upon the power of the states in the premises. It thus has two aspects, but in neither of them, either as a grant of federal power or as a necessarily consequential

limitation upon state power, does it affect Puerto Rico. In its aspects of a grant of power to the federal government it adds nothing to the comprehensive power given to Congress by the Constitution, Art. IV, section 3, cl. 2, to legislative with respect to national territory, and it can have no consequential effect of limiting territorial action since Congress already has the power under Art. IV, section 3, cl. 2, supra, to limit such action to any extent it chooses, even to the extent of annulling local legislation . . ."

"The actual question presented as we see it is whether Congress, in the exercise of its Constitutional power under Art. IV, section 3, cl. 2, to 'make all needful Rules and Regulations' respecting the Territory of Puerto Rico, has seen fit to give the insular government power to impose the disputed tax." *Buscaglia* v. *Ballester,* supra, 162 F. 2d at 806-807.

Although it has been held "that commerce between the States and a Territory which has become a part of the United States is interstate commerce," *Anderson* v. *Mullaney,* 191 F. 2d 123, 127 (9th Cir., 1951), affirmed at 342 U.S. 415 (1952) (Alaska), *Inter-Island Steam Nav. Co.* v. *Territory of Hawaii,* 96 F. 2d 412, 416-417 (9th Cir., 1938) (Hawaii), the Commerce Clause has been declared not to extend to an unincorporated territory, *Sancho* v. *Barcadi Corporation of America,* 109, F. 2d 57, 62-63 (1st Cir., 1940), reversed on other grounds sub nom. *Barcadi Corporation of America* v. *Domenech,* 311 U.S. 150, 95 L. ed. 98 (1940):

". . . The commerce clause (U.S.C.A. Constitution, Article I, Section 8, clause 3) grants the Congress

power 'To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.' By necessary implication, it prevents a state from regulating such commerce. But Puerto Rico is not a state. It is an organized Territory of the United States, though not yet 'incorporated' into the Union, . . . and the indubitable right of the Congress to regulate the Commerce of Puerto Rico is founded on the Constitutional power 'to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States.' (Constitution, Article IV, Section 3, Clause 2). The power is in no direct sense dependent upon the Commerce Clause which as this Court has said 'does not extend to Puerto Rico.' *Lugo* v. *Suazo,* 1 Cir. 59 F. 2d 386, 390. Cf. *Inter-Island Steam Navigation Co.* v. *Hawaii,* 9 Cir., 96 F. 2d 412.

"The decree of the District Court declaring such legislation unconstitutional cannot be affirmed upon the ground that the Puerto Rican statutes violate the commerce clause of the Constitution of the United States."

Heavy emphasis was placed in the Virgo Petition on *Mullaney* v. *Anderson,* 342 U.S. 415, 96 L. ed. 1328 (1952) and by both Petitions on *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1, 99 L. ed 773 (1955).

Both appellants cite these cases as indications that the Commerce Clause applies to the Territory of the Virgin Islands. A clear reading of the *Mullaney* case indicates a different conclusion. Justice Frankfurter stated in his decision that the only reasons that the Supreme Court determined that the Territory of Alaska

was governed by the Commerce Clause were (1) the Alaskan Organic Act itself which states, *"the Constitution of the United States* and all laws thereof which are not locally inapplicable which have the same force and effect within the Territory as elsewhere in the United States" and (2) further, that Section 9 of the Organic Act of Alaska extended the legislative power of the territory to "all rightful subjects of legislation not inconsistent with the *Constitution* and the laws of the United States." Justice Frankfurter emphasized this by stating *"in the light of these sections* we cannot presume that Congress authorized the territorial legislature to treat citizens of states the way states cannot treat citizens of sister states." p. 420 (emphasis supplied). The District Court of Guam in 1962 noted this distinction in reference to the *Mullaney* case wherein on page 937 of *Ambrose Incorporated* v. *Maddox,* 203 F. Supp. 934 (1962), the Court states "as the Court of Appeals pointed out in the *Mullaney* case, the Congress might confer upon the territory the power to impose burdens upon commerce. This Court cannot hold that it has not done so by its approval implicit in its failure to annul."[1]

By amendment of August 28, 1958 (V 75a), Congress amended subsection (a) of Section 8 of the Revised Organic Act of the Virgin Islands to read as follows:

> "(a) The legislative authority and power of the Virgin Islands is extended to all rightful subjects

[1] 48 U. S. C. Sec. 1574 Subparagraph (c) provides that the Legislature shall have power to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands, subject to the power of Congress to annul any such act of the Legislature.

> of legislation not inconsistent with this act or the laws of the United States made applicable to the Virgin Islands but no law shall be enacted which would impair rights existing or arising by vitrue of any treaty or international agreement entered into by the United States . . ."

Conspicuously absent from this amendment is the reference that appeared in the Organic Act of Alaska that no law shall be enacted in contravention of the Constitution of the United States. This section was enacted after the case of *Granville-Smith* v. *Granville-Smith,* supra, which held that the Legislature of the Virgin Islands is limited to acts of *local application* and extended the power of the Legislature of the Virgin Islands to all *rightful subjects of legislation.* Implicit in this act is the proposition that rightful subjects of legislation are *all* subjects of legislation that a sovereign may exercise subject only to the limitations which are contained in the Organic Act; for example, in the Organic Act of Alaska, where the limitation was that legislation may not be in contravention of the Constitution of the United States. It thus seems clear that Congress in the exercise of its plenary power over the Territory of the Virgin Islands may designate a different requirement than that which it designated for a different territory, especially when Congress reserved the right to annul such legislation when it is not considered in the best interest of the United States.

Furthermore, even if the Commerce Clause, the Export-Import Clause, or the prohibition on new exports as contained in the Organic Act of 1936 could be said to be applicable in general terms to acts of the

Territorial Legislature it would not reach the imposition of production taxes on the manufacture of watches as is here complained, because the taxes are imposed on products which have not reached the stream of commerce. The test of whether the goods have ceased to be a part of the general mass of property in a state subject as such to its jurisdiction by actual entry into the stream of commerce is equally applicable under the Commerce Clause and under the Export-Import Clause. *Empresa Siderugica, S.A.* v. *County of Merced,* 337 U.S. 154, 93 L. ed. 1277 (1949).

Petitioners in both cases rely on *American Oil Company* v. *Neill,* 380 U.S. 451 (1965) for the proposition "that when passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of its tax, that is, substance rather than form." However, what neither petitioner states is what immediately follows that quotation, which is: This approach requires us to determine the ultimate effect of the law as applied and enforced by a state or, in other words, to find *the operating incidence of the tax"* (emphasis supplied). (Ibid) It is to be noted that the facts of the *American Oil Company* case involved whether a state could tax a transaction outside of the state though there exists minimal contacts within the state itself. The Court stated that one of the outstanding prerequisites on state power to tax is the requirement that there must be "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." (Ibid) In the Virgin Islands there is more than a minimum connec-

tion. The entire manufacturing process which the territory is taxing occurs within the territorial limits itself and the territory imposes the tax upon the sale or removal of the watches from the factory. Compare *General Motors Corporation* v. *Washington,* 377 U.S. 436, 12 L. ed. 2d 430 (1964). Furthermore, in *General Motors,* supra, the Supreme Court has stated when concerned with state taxing statutes which impinge upon Commerce, "a careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the state is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of a tax. In other words, the question is whether the state has asserted its power in proper proportion to appellant's activities within the state and to appellant's consequent enjoinment of the opportunities and protection which the state has afforded." Id. at 440, 441. In considering the operating incidence of a tax on a purely mechanical basis, this Court has stated that the test of whether goods have ceased to be a part of the general mass of property in a state subject as such to its jurisdiction, by actual entry into the stream of commerce, is equally applicable under the Commerce Clause and under the Export-Import Clause. *Empresa Siderugica, S.A.* v. *County of Merced,* supra. "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the state's power to tax it." *Minnesota* v. *Blasius,* 290 U.S. 1, 9, 78 L. ed. 131, 135 (1933).

The Virgin Islands Watch Production Quota Act in its original form and as amended was intended to be a tax on the manufacture of watches and for the collateral purpose of preventing an excess amount of watches from being so manufactured that their likely entry subsequently into the stream of commerce between the United States and the Virgin Islands would lead to a reduction in tariff advantages that the Virgin Islands currently enjoyed and which tariff advantages were a primary force in securing manufacturing endeavors in the Virgin Islands. The mere fact that this tax measure which produced revenue for the Virgin Islands also served as a deterrent to manufacture of watches in excess of a quota, which quota was reasonably believed to be that amount of watches which could safely enter the United States without provoking Congressional action to remove these tariff advantages is neither an abuse of the proper taxing authority of the Legislature of the Virgin Islands nor a matter that the Courts should concern themselves with. As stated by this Court, "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages or even definitely deters the activities taxed." *United States* v. *Sanchez,* 340 U.S. 44, 95 L. ed. 49 (1950). See also *A. Magnano Company* v. *Hamilton,* 292 U.S. 40, 78 L. ed. 1109 and *United States* v. *Kahriger,* 345 U.S. 22, 97 L. ed. 755 (1953). Though the quota is measured by a percentage of annual consumption of watches in the United States, the quota itself is a fast figure. The measure of a quota, the same as the measure of a tax, is not the taxable event, that is to say, the operating incidence of the tax. *American Manufacturing Company* v. *St. Louis,*

250 U.S. 459, 63 L. ed. 1084. *Alaska* v. *Arctic Maid,* 366 U.S. 199, 6 L. ed. 2d 227 (1961). In *Alaska* v. *Arctic Maid,* supra, a tax was sustained though measured on the value of items which may have entered the stream of commerce. The Court states, "that, however, is the measure of the tax, not the taxable event. The taxable event is prosecuting the business of freezer ships and other floating cold storage. Part of the business is, of course, transporting frozen fish interstate. . ." In the Virgo Petition the appellant cites the cases of *Mandeville Farms* v. *American C.S.,* 334 U.S. 219, 230, 92 L. ed. 1328 (1948) and *United States* v. *Woman Sportswear Association,* 336 U.S. 460, 464 (1949), to the effect that these cases have "outmoded" the concept of interstate commerce, that commerce follows after manufacture and is not a part of it. These citations to this effect do not take into consideration *Empresa Siderugica, S.A.* v. *County of Merced,* supra, where it was stated that actual entry into the stream of commerce is the point at which either the Commerce or the Export-Import Clause applies. Furthermore, *Mandeville,* supra, is not a case concerning limitation of a state's power to tax but instead concerns an extension of the power of Congress to reach beyond traditional concepts of commerce so as to uphold the validity of Congressional action in the area of restraints of trade and monopolies, and the applicability of the Sherman Act. Likewise *United States* v. *Woman's Sportswear Association,* supra, is devoted to the same thesis, not the lack of the power of the states to legislate, but the extension of Congressional legislation in areas now considered to be within the realm of Congressional authority.

In the Master Time Petition it was contended that the cases of *A.G. Spaulding Bros.* v. *Edwards,* 262 U.S. 66; 67 L. ed. 865 (1923) and *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69; 91 L. ed. 92 (1946) hold, contrary to the case cited by the Court of Appeals, *Canton Railroad Co.* v. *Rogan,* 340 U.S. 511, 95 L. ed. 488 (1951), that *sale or removal* of goods is a portion of the export process. At the outset it must be remembered that these cases, unlike the instant case, involved a particular set of facts in the *application* of state laws, not the validity of the laws themselves. Here the District Court, on summary judgment in a declaratory proceeding, held that the Watch Production Quota Act, itself was invalid regardless of its application to any individual set of facts by holding that its *purpose* was to tax exports. It is this decision, based upon a void of facts as to the application of the statute, which the Court of Appeals reversed. Furthermore, it was neither the contacts of *sale* or *removal* of goods which this Court found in the *Richfield* or *Spaulding* cases to be contacts at which the operating incidence of the tax in these cases imposed a burden upon exports in contravention to the Constitution, but instead it was the contact of delivery that controlled these decisions. "The fact that *delivery to a common carrier* gave the sale immunity in *A.G. Spaulding and Bros.* v. *Edwards,* 262 U.S. 66, 67 L. ed. 865, 43 S. Ct. 485, supra, is seized upon as stating a rule that the process of exportation has not started until such delivery is made—" *Richfield Oil Corp.* v. *State Board of Equalization,* supra. The contact of "delivery" of oil into the hold of the vessel of a foreign purchaser in *Richfield Oil Corp.* v. *State Board of*

Equalization, supra, was the same contact which the Court in *Spaulding,* supra, seized upon to hold the application of that tax invalid as a tax on exports. The Virgin Islands imposes the Watch Production Quota Act tax on the sale or removal of goods, regardless of future deliveries, thus this is a tax wholly on manufacture, not export, unless some factual application of the tax could in a particular case show it to be a tax on exports. Nothing of this nature was before the District Court when it determined the entire format of the Watch Production Quota tax was illegal merely because that Court perceived an ulterior collateral purpose behind the tax.

II. The Governor was authorized by statute to deny Virgo's application for tax benefits on the ground that Virgo had failed to meet the requirement of need for governmental assistance.

The second question to which this brief applies is contained only in the Petition of Virgo, that is, whether the application of Virgo Corp. for tax benefits was denied improperly by the Government of the Virgin Islands "as part of an overall plan to avoid a conflict with the watch industry on the mainland" (Petition for Writ of Certiorari by Virgo Corporation, p. 19). No further reply need be given to this contention than that contained in the opinion of the Court of Appeals:

"The short answer to this contention is that the Governor stated in writing the reasons for this action, *which adequately supported it* (emphasis supplied) and political considerations were not

among them. We cannot look into the Governor's mental processes nor speculate as to what they were." (V-28a)

The adequate reasons were simply that Virgo did not show that it had met the statutory requirement that it had "need" for the benefits requested; 33 V.I.C. 4001 et seq.; nor did Virgo at any point in this action attempt to show that it had such need.

Conclusion

For the reasons stated, both Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1163

VIRGO CORPORATION, *Petitioner*

v.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 58 of this Court's Rules, petitioner (Virgo Corporation) asks rehearing of this Court's order of April 29, 1968, denying its petition for a writ of certiorari (with two Justices indicating that certiorari should be granted) to review the opinion of the Court of Appeals for the Third Circuit sustaining the Watch Production Quota Act of 1965, as amended (33 V.I.C. §§ 511-518), which imposed a discriminatory taxing scheme limiting the quantity of watches ex-

ported from the Virgin Islands to the continental United States.

This case presents the basic constitutional and statutory question of whether the Territorial Legislature of the Virgin Islands is empowered to regulate the movement of goods, such as watches, from the Virgin Islands to the continental United States where such regulation imposes an undue burden on commerce.

The court below relied on two basic arguments to uphold the Watch Production Quota Act's rigid quota system fixing the quantity of watch shipments from the Virgin Islands to the United States. First, it ruled that the 1954 revision of the Virgin Islands Organic Act (48 U.S.C. § 1574), by *implication,* repealed the entire Organic Act of 1936 (48 U.S.C. § 1406), which specifically provided: "That no new export duties shall be levied in the Virgin Islands except by the Congress." Secondly, the Court of Appeals asserted that the quota tax was not an undue burden on interstate commerce because the tax was imposed on the manufacture of watches; and in support of this conclusion, it invoked the old 1895 *E. C. Knight* case—a case which has long since been repudiated by this Court for drawing an artificial distinction between manufacturing and distribution for purposes of determining effect on interstate commerce.

Quite understandably, neither of these impoverished arguments is strongly relied upon by the Government of the Virgin Islands in its brief in opposition filed with this Court. Instead, the Government, in defense of the tax quota system, comes forth with its own novel —and truly preposterous—theory that the Commerce Clause of the Federal Constitution does not apply to

the Virgin Islands. For this extravagant claim, reference is not made to any specific legislative action by Congress. It is simply based upon an assertion of implied power.

The Government does not challenge the well-settled holding that "commerce between the States and a Territory which has become a part of the United States is interstate commerce." *Anderson* v. *Mullaney,* 191 F. 2d 123, 127 (9th Cir. 1951), *aff'd,* 342 U.S. 415 (1952). It contends, however, that "the Constitution does not follow the flag into unincorporated territories." (Br. Opp. 4) According to its argument, when the Organic Act of the Virgin Islands was amended to extend the legislative power from "acts of local application" to "all rightful subjects of legislation," Congress thereby "implicitly" granted power to the Territorial Legislature over "*all* subjects of legislation that a sovereign may exercise subject only to the limitations which are contained in the Organic Act." (Br. Opp. 9; emphasis in original) Since the Act does not mention the Commerce Clause, the Government of the Virgin Islands, therefore, concludes that the Commerce Clause does not apply to the Virgin Islands as an unincorporated territory.

The Congress, of course, in the exercise of its plenary power to "make all needful Rules and Regulations"* respecting the territories, may authorize the Territorial Legislature to impose burdens on commerce between the Territory and the States. However, this has never been done in the case of the Virgin Islands. Moreover, as this Court has said, any such grant of authority to a territory must be *specifically* made by the Congress;

* Constitution, Article IV, Sec. 3.

it cannot be implied. In *Anderson* v. *Mullaney, supra,* this Court rejected the argument that the constitutional prohibition against placing undue burdens on interstate commerce was not applicable to the territories, stating: "Only the clearest expression of Congressional intent could induce such a result." (342 U.S. at 420)

In the same case, the Ninth Circuit directly ruled that the extension of legislative authority in the Alaskan Organic Act to "all rightful subjects of legislation," did not authorize the Territorial Legislature to impose burdens on commerce between the Territory and the States. In that instance, the Court of Appeals stated that "we cannot conceive that in granting legislative power to the Territorial Legislature it was intended that the power should exceed that possessed by the legislature of a State in dealing with commerce." (191 F.2d at 128)

Similarly, in *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1 (1955), this Court, in reviewing the legislative authority of the Virgin Islands under the 1936 Organic Act, said that Congress did not intend "to give the Virgin Islands Legislative Assembly power to do what no State has ever attempted." (*Id.* at 16) Yet, the Virgin Islands now maintains that as an unincorporated territory it now has power over commerce which no state enjoys and which Congress has never granted even to the more mature incorporated territories.

Thus, it is clear that the Government's theory of exemption from the Commerce Clause conflicts with decisions of this Court. Beyond that, it conflicts directly with prior decisions of the Court of Appeals for

the Third Circuit, which have held that the Commerce Clause of the Federal Constitution applies to the Virgin Islands.

In *Southland* v. *St. Croix Taxicab Association,* 315 F. 2d 364 (3d Cir. 1963), the Court of Appeals unanimously invalidated a franchise agreement between the Government of the Virgin Islands and a taxicab association which excluded other vehicles for hire, and it based its decision clearly on "our conclusion that the [agreement] . . . runs afoul of the Commerce Clause of the Constitution." (*Id.* at 369) In other cases, the same court has recognized that the Legislature of the Virgin Islands is bound by the Federal Constitution. For example, in *Port Construction Co.* v. *Government of the Virgin Islands,* 359 F. 2d 663 (3d Cir. 1966), the Third Circuit specifically stated: "The Legislature of the Virgin Islands has full legislative powers limited only by the Constitution. . . ." (*Id.* at 667)

Thus, it is clear that the decision below raises fundamental questions of the Territorial Government's powers as they relate to the Federal Constitution. A decision so out of step with well-settled constitutional law doctrine should be reviewed by this Court.

The important question of the application of the Commerce Clause to the legislative powers of the Virgin Islands needs to be settled now. The question not only involves the validity of the various legislative and administrative measures taken by the Virgin Islands with respect to the watch industry, but equally affects all other forms of local manufacturing in the Islands which are dependent upon free access to markets located in the various States. Plainly, an American territory which is permitted to regulate its eco-

nomic life without regard to the Commerce Clause of the Constitution will be encouraged to develop an economy separate and apart from the rest of the Nation. If economic parochialism is to be the fate of the Virgin Islands, then surely that policy should be determined by Congress, and not solely by the special interests of the Territorial Government.

For these additional reasons, petitioner requests this Court, on reconsideration, to grant this petition to review the three questions raised with respect to the nature and proper exercise of governmental power by the Virgin Islands within the framework of our constitutional system.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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Dated: May 23, 1968